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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NJK HOLDINGS CORP., DCC VENTURES, LLC, NASSER J. KAZEMINY, and THE TRIOMPHE INVESTORS, LLC, Plaintiffs, v. FIRST LONG ISLAND INVESTORS, LLC, FLI DEEP MARINE LLC, BRESSNER PARTNERS LTD., LOGAN LANGBERG, HARLEY LANGBERG, and JEFFREY LANGBERG, Defendants and Counterclaimants, v. NJK HOLDINGS CORP., DCC VENTURES, LLC, NASSER J. KAZEMINY, THE TRIOMPHE INVESTORS, LLC, NADER KAZEMINY, OTTO CANDIES, JR., OTTO CANDIES, III, OTTO CANDIES, LLC, JOSEPH J. GRANO, JR. and CENTURION HOLDINGS LLC, Counterclaim Defendants.	Case No. 11-cv-6946 (DLC) ECF Case

DECLARATION OF KATHERINE B. HARRISON IN SUPPORT OF MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

I, Katherine B. Harrison, under penalty of perjury, declare as follows:

1. I am a member of the bar of this Court, admitted to practice law before the courts of the State of New York, and a member of Paduano & Weintraub LLP, counsel for defendants and counterclaimants First Long Island Investors, LLC, FLI Deep Marine LLC, Bressner Partners Ltd., Logan Langberg, Harley Langberg and Jeffrey Langberg in this action.

2. I respectfully submit this Declaration in support of Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint as to First Long Island Investors, LLC and Counts I, IV And V of the Second Amended Complaint as to all Defendants (the "Motion to Dismiss") pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

3. A true and correct copy of the transcript of the November 2, 2009 Scheduling Conference before now-Chancellor Strine of the Delaware Chancery Court, referenced in footnote 1 of the Memorandum of Law in Support of Defendants' Motion to Dismiss, is annexed hereto as Exhibit A.

4. A true and correct copy of the transcript of the January 21, 2010 Temporary Restraining Order Hearing in the United States Bankruptcy Court for the Southern District of Texas (the "Bankruptcy Court"), referenced in footnote 2 of the Memorandum of Law in Support of Defendants' Motion to Dismiss, is annexed hereto as Exhibit B.

5. A true and correct copy of (i) Bankruptcy Court's June 13, 2011 Memorandum Opinion, (ii) the Bankruptcy Court's August 5, 2011 Report and Recommendation to the United States District Court for the Southern District of

Texas, (iii) the Order of the United States District Court for the Southern District of Texas, dated October 14, 2011, adopting the Report and Recommendation of the Bankruptcy Court, and (iv) the Final Judgment of the United States District Court for the Southern District of Texas, dated January 11, 2012, referenced on page 9 of the Memorandum of Law in Support of Defendants' Motion to Dismiss, are annexed hereto as Exhibit C.

Pursuant to 28 U.S.C. Section 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on January 13, 2012.

Katherine B. Harrison

EXHIBIT A

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

FLI DEEP MARINE LLC, BRESSNER PARTNERS LTD., LOGAN LANGBERG AND HARLEY LANGBERG	:	
Plaintiffs,	:	
vs.	:	Civil Action No. 5020-VCS
PAUL McKIM, B.J. THOMAS, DANIEL ERIKSON, FRANCIS WADE ABADIE, OTTO CANDIES, JR., OTTO CANDIES, III, EUGENE DePALMA, LARRY LENIG, JOHN ELLINGBOE, BRUCE GILMAN, JOHN HUDGENS, NASSER KAZEMINY, DCC VENTURES, LLC, NJK HOLDINGS CORPORATION, NKOC, INC., OTTO CANDIES, LLC, DEEP MARINE HOLDINGS, INC., AND DEEP MARINE TECHNOLOGY, INC.,	:	
Defendants.	:	

- - -

Chancery Court Chambers
New Castle County Courthouse
Wilmington, Delaware
Monday, November 2, 2009
10:00 a.m.

BEFORE: HON. LEO E. STRINE, JR., Vice Chancellor.

OFFICE CONFERENCE

CHANCERY COURT REPORTERS
500 North King Street - Suite 11400
Wilmington, Delaware 19801-3759
(302) 255-0525

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- - -

THE COURT: Good morning, everyone. You may proceed.

MS. HARRISON: Good morning, Your Honor. Kate Harrison from Paduano & Weintraub, counsel to FLI Deep Marine LLC, Bressner Partners, Ltd., and the Langbergs, former minority shareholders of approximately 5 percent of Deep Marine Holdings, Inc., and its wholly owned subsidiaries Deep Marine Technology, which we call together DMT.

Plaintiffs were most recently squeezed out of DMT in a Delaware short-form merger. The defendants are DMT, the controlling shareholders and their entities, the current and former officers and directors who have systematically stripped plaintiff of their entire $1.75 million investment and their legal rights to complain or even inquire about what happened to the company they invested in.

Plaintiff invested approximately $1.75 million in 2002 in a startup company to provide subsea services in the oil and gas industry -- offshore, mainly, Gulf of Mexico.

THE COURT: I've read everything. We're at a scheduling conference.

What is it you're seeking to enjoin?

MS. HARRISON: We want to make sure that what remains of the assets of DMT are not taken out of the jurisdiction so that we are left with absolutely no remedy.

We fear that DMT and these defendants are right now in the middle of selling the last few valuable assets -- the vessels -- and that they may be selling them under market value and that the proceeds will disappear. So we seek to -- we seek to enjoin only sales out of the ordinary course, and we just ask that the proceeds be held in escrow and we seek expedited discovery.

THE COURT: Okay.

MR. MAIMONE: Your Honor, Mike Maimone for Deep Marine Holdings and Deep Marine Technology.

What plaintiffs are seeking here is, in my view, unusual. I don't -- we view this as a statutory appraisal action. We think all the issues that are set forth in the complaint should be dealt with in the appraisal action. I think the Glassman decision in the Supreme Court holds that.

Actually, the fiduciary duty claims are probably subject to a motion to dismiss by my friends on the defendants' side, since I represent the

company, the company has no fiduciary duty. But in connection with the current application, plaintiffs base their application on pure speculation. Deep Marine is an operating company. I was told by Deep Marine that there's no plans to liquidate. There's no plans to dissolve. They're merely trying to raise cash to keep the operations going.

The plaintiffs, as a form of stockholders, have taken the status as creditors. In the Alabama By-Products decision, the Supreme Court held that if you perfect your appraisal rights -- we're not conceding that everyone perfected their appraisal rights -- but to the extent that any of the plaintiffs perfected their appraisal rights, they're creditors of the company and we believe they have full rights of creditors. They have the fraudulent conveyance laws to protect them -- 174 to protect them. They have all the relief that the Court of Chancery recognized in North American Catholic to protect them.

So we don't really see the reason to enter a TRO because Deep -- there's no -- based in the complaint or any of the papers tendered, a TRO -- Deep Marine is an operating company. It's going forward.

If that changes, then plaintiffs can enforce their rights at that time. Right now, plaintiffs haven't a ripeness argument because nothing is happening. Plaintiffs are dealing with speculation because they don't know anything and there's nothing really to know. This is a damages action, where we can just move forward in the ordinary course. My friends on the defendants' side could file whatever motions they deem appropriate in connection with a motion to dismiss. The company will deal with the appraisal action appropriately, and we can just move forward with the appraisal action and whatever motion practice my friends feel --

THE COURT: When the appraisal notice was given, was the special committee report disclosed?

MR. MAIMONE: My understanding is it was not.

MS. HARRISON: As you can tell from the chronology of the case, the company announced that the committee had reached its conclusion. It did not give anybody the report, and the very next day it announced the short-form merger. So it thereby ruined our standing to continue the derivative action the very next day. So we find the timing of that highly

suspicious. I think, when Vice Chancellor Noble dismissed our derivative action without prejudice, he assumed that we would be back.

THE COURT: Did no one get Mr. Miller on the phone?

He is on the line.

Okay. Here's what we're going to do, folks. I'm not setting up any kind of injunction schedule. I don't know what we would enjoin. On the other hand, I am granting expedited discovery. I'm not exactly clear -- off the record.

(Discussion off the record.)

THE COURT: Back on the record. This is a little wacky situation. I don't want -- I will tell the defendants -- individual defendants -- don't be looking for me to be sympathetic to motions to stay discovery. Discovery is not going to be stayed. I'm allowing expedited discovery because, frankly, this is a record that creates a situation that -- at least a colorable perception that people are horsing around. I mean, the moving papers, with all fairness to the defendants, telling me that they somehow got vindicated in the derivative action, that's not what happened at all. That is not what Vice Chancellor

Noble's decision says. What it says is people goofed up. It's not the first time I've seen people goof up like this. Folks who don't consult with Delaware lawyers early on in a process sometimes, when they make a demand, they go, "Oops." But the point is, there's basis under the law to challenge even a special committee's investigation. But you have to wait until it's done.

As I understand what the defendants did before Vice Chancellor Noble is say, "Look, the law's the law." They goofed up. I believe Vice Chancellor Noble indicated some doubts about the independence of the committee. He let the process go forward. Frankly, the defendants made arguments about the amount of time they needed. It's not clear to me. You can all shed light on this later on whether the defendants were forthcoming about when they were planning the merger, whether they were at all planning a merger during the pendency of the suit before Vice Chancellor Noble, whether they let anyone know about it. Very interesting circumstances.

It may well be that all of these things can be litigated purely in the context of the appraisal. But the reality is, that's why discovery

should go forward because, if the defendants' -- individual defendants' -- argument is it all got bought into the respondent, but you have to value all these claims in the appraisal, well, then, the discovery should go forward because it's essentially a merits discovery. It's going to be relevant to value.

I also think there is some concern about the respondent and the ability of the respondent to answer these claims. You know, it would be a much more edifying record, if somebody wants to put out an appraisal notice with the actual report, if there is such a report. Who knows at this point? What there was some sort of exculpatory release apparently saying, you know, nothing happened that was actionable and there's a short-form merger and I think people got offered pennies.

MS. HARRISON: One penny a share.

THE COURT: A penny a share.

So, it's a rather odd circumstance. I have read Glassman. I'm very familiar with the 253 jurisprudence. I don't know what the exception is for fraud, other sorts of things. But I won't rule out at this stage the following possibility. There's a derivative action pending. Folks made a procedural

goof-up by making a demand. A special committee is formed in order to delay, doesn't really do a professional job or an independent job, issues a report which -- to somebody, but not to any of the people who brought the derivative claims. And while it gets the case dismissed on the grounds of delay, that we need to investigate this and, immediately upon concluding this thing, a short-form merger is done to excuse -- to essentially wipe out the claim. We do know that there is jurisprudence that says, when a merger is done specifically for the purpose of getting rid of claims, that that doesn't really get rid of the claims. If there's ever a circumstance again where people have played themselves into a perception, I could not on a motion to dismiss rule out the inference that these folks wanted to get rid of these claims and did a short-form merger. You know, mergers are powerful things. They're not just thought of instantaneously. This one was done fairly shortly after Vice Chancellor Noble considered a motion to dismiss and granted it.

So what I would also urge on the plaintiffs' side -- and I think I get into the Delaware law. There's really no need. We're seeing

this more and more in the Court. 7 million counts. I mean, I'm not saying -- you know, aiding and abetting against the officer and director defendants. If you're an officer and director, there's a term for when you aid and abet a breach of fiduciary duty. It's called a breach of fiduciary duty. It's not -- we don't have like everybody is guilty of a breach of fiduciary duty, plus because they did it in concert with their fellows in aiding and abetting claim.

I don't know what this fraud through concealment is. How is that different from breach of fiduciary duty? Fraud through silence in the face of disclosure. A claim against controlling shareholders for wrongful equity dilution. Claim against controlling shareholder defendants for unjust enrichment. I don't know how that's different from the third cause of action, which is claims against the controlling shareholder for breaches of their fiduciary duties. It strikes me that, if they didn't breach their fiduciary duties, there was no unjust enrichment that, with respect to wrongful equity dilution, what you're arguing is, there is a breach of fiduciary duty and therefore these were self-dealing

transactions that wrongfully diluted folks because the transactions were improperly priced or motivated. These are not really separate causes of action.

Accounting. Accounting is a remedy. You can put that in the wherefore clause, I believe. You can say, wherefore because there have been breaches of fiduciary duty, we need to get to the bottom of this. There ought to be an accounting. All I'm saying is, you're going to get expedited discovery. I would urge on the cost sides of this -- I don't know how big this company is or what it is. All I do know is two, four, six, eight, ten, 12, 13, plus Mr. Miller on the phone, 14 lawyers, let the record reflect. And I may have miscounted. I'm not that great at math. Fourteen lawyers already. This is an expensive morning; right? For the cost of this morning, you could have doubled the consideration given in the merger to the plaintiff. Right?

You know, only clients know what really happened. Obviously there are professors of philosophy who would say even they don't actually know what happens. They have a perception of what happened. But my point is that, you know, one of the things that our profession really has to do is, you

always have to take -- you want to be vigilant in representing your clients, but you actually need to challenge them and talk to them. I don't know how really valuable this is from the plaintiffs' side. I don't know if this was a business going down the drain. There's obviously the possibility, for example, that these people did trivial -- even if you accept the complaint as true -- did trivial self-dealing transactions around the margins because there was a political buddy. But that, in the scheme of the world, they don't add up to a lot of economic value.

I mean, you know, is this case really about Mr. -- former Senator and Mrs. Coleman? If it's a matter of that and some sort of principle, the case might be settleable on that basis. Give to the people who were cashed out the maximum amounts allegedly overpaid to Senator Coleman and Mrs. Coleman. As I get it -- I might be wrong -- but it wouldn't be gazillions of dollars. It might be nice for people like around here who work for the state and yearly pay cuts, we would like to have some supplement of 25,000, or whatever it was a month, or $75,000.

But my point is that out of that does

not an appraisal case make. These obviously -- these things with boats, though, and other things, at first I couldn't -- Mr. Candies' name got me distracted because I was trying to figure out the synergies between a maritime company and some sort of candy company, until I realized this was just a person's name. It's like oh, there's Candies. A venerable chocolatier in Minneapolis. Everybody at Christmastime gives a box of Otto Candies to their kids.

But what I'm saying, you have to size up what you get out of this rather than you're just angry. I'm not saying that's what's motivating it. You have to figure that out.

On the defendants' side, again, you know, you can't represent your clients without doing a reality check on what went on. And sometimes things that -- you know, sometimes things that look slick are perfectly fine. And when it's all said and done, it all looks above board. Obviously, when things that are done are slick, they look slick. The genuinely slick don't look slick because they figure out ways for it not to look, you know, so immediately suspicious. This is a situation where people managed.

Might have been the best thing in the end. I don't know. But obviously was a course of events that didn't look exactly edifying, particularly a short-form merger like this where the economic consideration given to the people being cashed out was basically bupkis.

So, before you get into discovery, you may want to figure out where your respective positions are. What are the plaintiffs seeking out of this? I don't know how many stockholders there were in general. Obviously the investment -- is the investment of all the cashed out people 1.7 million?

MS. HARRISON: No. That's just our clients. There are a couple of other -- not very many minority shareholders. There are a couple of other groups.

THE COURT: You don't know what their percentage holdings were in comparison to your clients?

MS. HARRISON: Well, at the end of it, because of the short-form merger, they held 90 percent, we held 5 percent.

THE COURT: I'm just talking about like in terms of cash in. You're saying your clients

put in 1.7 million to get in?

MS. HARRISON: I don't know that. But I know there is a group -- there is another group of minority shareholders --

THE COURT: Did they perfect appraisal rates?

MS. KRAFT: DeepWork is here, Your Honor, we filed a tag-along action and we did perfect our rights, is our contention, and that was somewhere in the vicinity of $800,000. A little bit over a million. I'm still trying to figure that out.

THE COURT: So there's another action. Have I gotten papers in chambers about that?

MS. KRAFT: They were sent over on Friday. My understanding -- and I spoke with counsel for the FLI plaintiff earlier -- is that there are a couple other minority shareholders. This was not filed as a class action. That's another consideration for amendment. We haven't really spoken about that.

THE COURT: Well, I think one of the things you ought to be talking about is coordinating whether it's a class action or not. Obviously it would be better to have one complaint. But between your two groups, do we essentially have all the other

minority --

MS. HARRISON: I think a couple of the defendants also have -- were minority shareholders.

THE COURT: I'm assuming they don't care about that.

MS. HARRISON: Right. But what I'm saying is, I think it's a very small universe of minority shareholders.

MS. KRAFT: We're thinking maybe about a group of five or six. Would that be correct?

MS. HARRISON: Yeah, at most.

THE COURT: Five or six, in addition to your groups?

MS. HARRISON: No, I think it might be DeepWork and maybe one other group only.

THE COURT: Is Mr. McKim part of one of these groups?

MS. HARRISON: Mr. McKim is a defendant.

THE COURT: I understand that. I get that he's a defendant. Your papers didn't seem particularly hostile toward him.

MS. HARRISON: Well, because we believe he was a whistleblower, in a sense.

THE COURT: Right.

What I'm trying to talk about here is -- in a room where we got -- what did we say? --we counted up with Mr. Miller, 15 or 14 lawyers -- is, as we go forward, there will be material amounts of money spent.

MS. HARRISON: Absolutely right.

THE COURT: All I'm saying is, sometimes what people want -- you know, they don't want to be suckers -- is sometimes, if you focus early on what's at stake, what the costs of enforcement are and all that kind of good stuff, you know, it may be like everybody gives their clients litigation budgets and all that kind of stuff. That before you go spend hundreds of thousands of dollars, as you will in discovery, no doubt, that you begin to think about, you know, what it is. Sometimes people's investments in -- "Like I at least want my money back and I think these people are jerks and I will never invest with them again. If I can at least get the skin that I put in the game back or something like it, then I'm willing to move on because I'm realistic about the world." You know, I don't know. I don't know what that would mean in terms of the defendants. I don't

know any of it.

I do know, as professionals, if you're representing people who are being rational, now is the time, rather than later, to think about it. What I'm saying to the defendants is, this is not a surgical case. This is not one you're going to come in and say this is a really neat, tidy record. We had Warren Buffett and Bill Gates as the special committee, advised by counsel for religious elders and ethics professors, and therefore, you know, you just get rid of it early. It's just not going to be that way. It may over time bear up. But it bears up after, you know, that wonderful thing we call discovery.

And after the discovery happens, people writing briefs and all that kind of stuff, which, again, I don't know how people keep that in the five figures. Since you all -- you are going to have those costs, too. Fee shifting is not prevalent in the U.S. I don't know what these things are worth in the current market. So take that to heart. I don't need to set a schedule at this point. You need to talk about getting discovery going.

What I would suggest would be

rational, if you're not going to get it settled, would be that you focus on getting some document discovery done first, then perhaps getting the plaintiffs to -- the multiple plaintiffs to coordinate and file an amended pleading that everybody takes a shot at.

MS. HARRISON: Your Honor, this is a difficult group of lawyers. I've had already difficult experiences with this group. If I could ask you to set some kind of a schedule, also. We need it. That's one reason I'm here.

THE COURT: What I would tell to the defendants, this is going to be sort of self-enforcing. You're going to have claims holding over your head until you get the document discovery done.

You know, it's going to be pretty simple. You know, they're going to want to get rid of the claims. Well, you're shaking your head. I'm not going to do this. Look, they're in court now. If people horse around with this Court, this Court takes care of them. I've ordered the discovery to go forward and it's going to go forward. If people are obstinate, they will -- you can file a motion.

MS. HARRISON: Thank you.

THE COURT: I think everybody understands.

I have no idea -- you said they're difficult. I don't know how difficult you've been, not to say that you're not the most gracious, wonderful person in the world. I'm just not there. Sometimes it's been my experience that -- on more than one occasion -- that difficulties arise and no one is exactly in the right.

What I'm saying is, you haven't made any kind of record of that today. You have not.

MS. HARRISON: It's in my affidavit.

THE COURT: What, that they didn't give you documents?

MS. HARRISON: It's in my affidavit that my very first phone call with Nasser Kazeminy's law firm is the man threatening me. It's a very difficult group of lawyers. I've never experienced that kind of difficulty in my life, and I've been practicing for 20 years. And I practice in New York City where you think they're tough. I have not experienced this before. And I really believe that we need --

THE COURT: Well, you're in Chancery

now. I don't know who is representing -- I can't pronounce his name at this point.

MR. EAGLE: This is David Eagle. I'm representing Nasser Kazeminy. I never met Miss Harrison until this morning. Never had a phone call or e-mail. We're in Delaware. We're in Chancery Court. Everyone is going to work cooperatively.

THE COURT: If you hear from somebody who is not admitted pro hac about this case, then bring it to the attention of the Court. What you did in -- before this case was filed -- again, I was not the Judge. I don't know if this was before in the later case, or after the dismissal or whatever. But I have found that when people have to file pro hac and get -- you know, face the music, all -- we do have Delaware lawyers here and they're regularly accountable to the Court. And they're the ones -- the people who are appearing here are the ones going to be responsible for discovery.

I also expect -- I shouldn't have to say this, but I've been astonished -- I expect that the Delaware lawyers will be meaningful in discovery and discovery is not left to clients. People visit offices, people find out where the documents are.

People don't tell clients, "Go through your hard drive and find your e-mails." That is not discovery. That was never appropriate discovery before e-mail. It's certainly not now. You never told a client, "Oh, look in your drawer. Find all the good stuff and send it to me." Yeah. Right. I mean, that is not a trustworthy way to do discovery.

I'm also assuming, if there was a special committee report, that a lot of the stuff is compiled.

MS. SCHENKER POLLECK: Your Honor, could you order a stipulated order for discovery or --

THE COURT: If you all -- the ones getting close to the line now are on the plaintiffs' side of the table. Okay? This is not take-out. I'm not taking your take-out menu. I ordered expedited discovery. The first instance you sit down, you can use the room here and you can talk to your colleagues. The way we're going to do this is documents first. I said that. I think I've been pretty clear. You get the documents from all the defendants.

What I would then suggest is a period of time for the plaintiff to put together an amended pleading. I'm not going to say whether expedited

discovery means they get the documents in ten days, 20 days or 30 days. This is a claim for money. Okay? This is what this is about. I'm also not going to have two groups of plaintiffs acting in an uncoordinated way.

MS. KRAFT: Your Honor, Denise Kraft. I intend to fully coordinate. We don't have the ability to do that yet. We will absolutely coordinate this case.

THE COURT: Right. Again, get -- think about your litigation budgets, think about early on whether, you know, it makes sense to go forward or whether you want to take a shot at resolving it early because it's going to get expensive. But that's the structure. I'm not going to sit here and tell you how many minutes.

You haven't even talked to the people on the other side.

Okay. Thank you.

(Conference adjourned at 10:35 a.m.)

CERTIFICATE

I, DIANE G. McGRELLIS, Official Court Reporter of the Chancery Court, State of Delaware, do hereby certify that the foregoing pages numbered 3 through 25 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 3rd day of November, 2009.

/s/ Diane G. McGrellis

Official Court Reporter
of the Chancery Court
State of Delaware

Certification Number: 108-PS
Expiration: Permanent

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

DEEP MARINE HOLDINGS, INC.	**§**	**CASE NO. 10-3026-H1-ADV**
	§	**HOUSTON, TEXAS**
VERSUS	**§**	**THURSDAY,**
	§	**JANUARY 21, 2010**
FLI DEEP MARINE, LLC	**§**	**3:00 P.M. TO 4:13 P.M.**

TEMPORARY RESTRAINING ORDER HEARING

BEFORE THE HONORABLE MARVIN ISGUR
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

FOR PLAINTIFF:	**SEE NEXT PAGE**
FOR DEFENDANT:	**SEE NEXT PAGE**
COURT RECORDER:	**SUZANNE GUEVARA**
COURT CLERK:	**RISHONA SMITH**

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EXHIBITS

PLAINTIFFS/DEBTORS:	Marked	Offered	Received
Exhibit Number 1	10	16	17
Exhibit Number 2	11	16	17
Exhibit Number 3	11	16	17
Exhibit Number 4	12	16	17
Exhibit Number 5	12	16	17
Exhibit Number 6	12	16	17
Exhibit Number 7	13	16	17
Exhibit Number 8	13	16	17
Exhibit Number 9	13	16	17
Exhibit Number 10	13	16	17
Exhibit Number 11	14	16	17
Exhibit Number 12	15	16	17
Exhibit Number 13	15	16	17
Exhibit Number 14	16	16	17
Exhibit Number 15	15	16	17

HOUSTON, TEXAS, THURSDAY, JANUARY 21, 2010, 3:00 P.M.

THE COURT: All right. Please be seated.

Okay. We're here on the Temporary Restraining Order hearing in the Deep Marine Holdings case. It's Adversary proceeding 10-3026. We'll take appearances in court, then we'll take appearances on the telephone.

MS. KURTZ: Good afternoon, Your Honor. Marcy Kurtz with Jason Cohen, here on behalf of the Debtor and the Plaintiffs in the adversary proceeding.

THE COURT: All right.

MR. MOAK: Good afternoon, Your Honor. Paul Moak, M-O-A-K, on behalf of the Creditor's Committee.

THE COURT: All right. Anyone else appearing here in court?

(No audible response.)

THE COURT: All right. On the telephone, we have an appearance from New York. Who would that be?

MR. PADUANO: Your Honor, it's Anthony Paduano and Jason Snyder, dialing in right now for FLI Deep Marine, LLC, Bressner Partners, Logan Langberg, Harley Langberg.

THE COURT: All right. Thank you.

MR. PADUANO: And Your Honor, I've submitted a pro hac vice application and also on the phone is -- or dialing is in Lisa Golden from the Jaspan Schlesinger firm, also in New York.

THE COURT: All right.

MR. PADUANO: At some point will enter her appearance in this case, as well.

THE COURT: Okay. I probably have both of you-all available on the phone right now.

Ms. Golden, can you hear me? Ms. Golden, are you there?

(No audible response.)

MR. PADUANO: She's supposed to dial in, Your Honor. I don't know if she's here yet or not.

THE COURT: I'm showing I've got two people from your firm both on the phone, so I assume she's somewhere.

MR. PADUANO: Thank you, Your Honor.

THE COURT: And then I have somebody from the 516 area code?

MR. PADUANO: That's her, Your Honor.

MS. GOLDEN: Good afternoon, Your Honor.

THE COURT: Thank you. Who's here from the 516?

MS. GOLDEN: Your Honor?

THE COURT: Yes.

MS. GOLDEN: Hi. The 516 number is Lisa Golden.

THE COURT: All right. Thank you.

MS. GOLDEN: And we are in the process of also preparing our pro hac vice motion.

THE COURT: All right. Let's not -- anyone who

wants to appear in a TRO hearing can appear without the necessity of the pro hac. I'm not going to get too tied up on that, but thank you for telling me.

MS. GOLDEN: Thank you, Your Honor.

And then from, I think, New Orleans, who do we have?

MR. ZIMMERMAN: Karl Zimmerman from Baldwin Haspel Burke & Mayer, representing Otto Candies, LLC, Otto Candies, III, and Candies Shipbuilders, LLC, which is a creditor in the bankruptcy proceeding.

THE COURT: Thank you.

MR. ZIMMERMAN: I also filed a pro hac vice application.

THE COURT: All right. I haven't seen any for HUX yet, so same rule for you.

In the 612 area code? Do we have anybody from 612 participating? Hold on. I didn't click it right. Let me try that from the 612?

MR. WINDLER: Your Honor?

THE COURT: Yes. Who do we have?

MR. WINDLER: Joseph Windler with the law firm of Winthrop and Weinstine in Minneapolis. I represent Nasser Kazeminy, JK Holdings, DMT Ventures, Daniel Ericson, John Hudgeons, and Eugene Diploma in the Delaware proceedings and the Kazeminy's in the bankruptcy proceeding, as well.

THE COURT: Thank you.

And finally, we have someone from Houston, 713-668 exchange?

MR. DAVIS: Hi, Your Honor. Tony Davis. My plane literally just landed. I'm here on behalf of the Kazeminy and Candies entities.

THE COURT: Thank you. All right. I've read the application and some of the exhibits. There's an opposition brief that I did not see until I just walked out and I now see it on my screen.

MS. KURTZ: Did Your Honor want to take a minute to read that?

THE COURT: Yeah. I need to. I did not realize that had been filed and I apologize.

MS. KURTZ: That's fine. No problem. Let me --

THE COURT: What time did that come in?

MR. PADUANO: Your Honor, there's also -- Anthony Paduano, Your Honor. There's also an affidavit with probably substantial exhibits that we've also put on the PACER.

THE COURT: Right. That's part of that opposition brief, right?

MR. PADUANO: There are two separate instruments, Your Honor, two separate documents.

MS. KURTZ: The brief, Your Honor, is about 16

pages and then there's a rather -- you know, about an inch stack of exhibits attached to an affidavit, which was a document filed just after the memorandum.

THE COURT: Right. I think the way it got filed -- and I just want to make sure I'm reading the right thing -- is that the affidavit got filed along with the brief as an attachment to the brief. I just want to be sure that's what you want me to read? And I'm looking -- it got filed at 2:59, so I'm not going to feel too bad that I didn't get to read it before I got out here.

MR. PADUANO: That's fine. No, Your Honor, of course not. I'm looking at Docket Number 146 that --

THE COURT: I've got document 14 is the brief.

MR. PADUANO: Correct.

THE COURT: And then it has attached to it an affidavit and then the affidavit has attached to it, 21 exhibits.

MR. PADUANO: Correct, Your Honor, yes.

THE COURT: That's it? Okay. Let me just step down and let me go read that. I'm just going to have everybody hold on the phone while I go back and read it. I'm sure this will be ten or 15 minutes and I'll come back and we'll restart the hearing. Thank you.

(Recess taken from 3:07 p.m. to 3:18 p.m.)

THE COURT: Okay. Ms. Kurtz, let's go ahead.

MS. KURTZ: Thank you, Your Honor. Mr. Moak may have just stepped to the men's room. He'll be in just any minute. I just wanted to tell the Court we're ready to go though.

THE COURT: Okay.

MS. KURTZ: Your Honor, I think that -- I've been debating here. I think I'm just going to start in chronological order how this began and bring us to the current, which will then lead into why we're here today, why we're entitled to a Temporary Restraining Order and meet the standard for that and the specific relief we're asking the Court for today, based on the pleadings that are live in the Delaware action.

If the Court has the Exhibit Book that was prepared by the Plaintiffs/Debtors in front of you, I'm going to just highlight through what those exhibits are. That will make more sense when I offer those exhibits into evidence, Your Honor.

(Plaintiffs/Debtors Exhibit Number 1 marked for identification.)

MS. KURTZ: If you'll look at Exhibit Number 1, the actions between the Delaware Defendants -- I'm sorry, the Delaware Plaintiffs, who are the Defendants in the adversary proceeding, started when they filed a Verified Complaint, which we have as Exhibit Number 1, alleging what

they claim on their own, if you look at page 1 to be a shareholder's derivative action claims brought against the Debtors and certain of the other individual Defendants that have been named in the Delaware action.

(Plaintiffs/Debtors Exhibit Number 2 marked for identification.)

MS. KURTZ: And that matter, Your Honor, if you'll notice Exhibit Number 2, was dismissed by the court -- by the Chancery Court of Delaware for a failure to follow certain of the rules or to state it even more objectively. Apparently there was a demand by the Plaintiffs in that case for certain information. The Defendants had not had a sufficient time to respond to that demand for information. The Chancery Court said, "I'm going to dismiss this action and give them a chance to respond."

(Plaintiffs/Debtors Exhibit Number 3 marked for identification.)

MS. KURTZ: Shortly after doing that, Your Honor, if you'll look at Exhibit Number 3? Plaintiff's First Amended Petition was filed in the State District Court in Harris County, Texas. It is virtually identical to Exhibit Number 1 and it was filed two months after the dismissal of Exhibit Number 1 and after the entry of the Order, Exhibit Number 2. These claims are also in derivative in nature. They say so themselves on page 3 and otherwise in that

Complaint. They are very similar, if not verbatim, in many cases to the allegations that are found in Exhibit Number 1.

(Plaintiffs/Debtors Exhibit Number 4 marked for identification.)

MS. KURTZ: There was an Amended Motion to Dismiss and an Order granting that dismissal, which we've marked as "Exhibit Number 4," where the Defendants in the State Court action in Texas, which were the same as the Defendants in the Delaware -- the first Delaware action, where they sought and obtained a dismissal of the Texas suit because the claims were derivative in nature and that the Plaintiff lacked standing to bring them.

(Plaintiffs/Debtors Exhibit Numbers 5 and 6 marked for identification.)

MS. KURTZ: Exhibit Number 5 is the live Complaint. Exhibit Number 6 is what we've called a "copycat" or a "Me, Too, Complaint," filed by an additional Plaintiff, the same Defendants. And that -- those are the two actions, Your Honor, 5 and 6, that we're here on today where the Debtors are asking the Court to enter a Temporary Restraining Order until such time as you can determine whether the claims that have been pled in Exhibits Numbers 5 and 6 are property of the estate or otherwise stayed as being direct actions against the Debtor.

(Plaintiffs/Debtors Exhibit Number 7 marked for

identification.)

MS. KURTZ: Exhibit Number 7, Your Honor, is the Suggestion of Bankruptcy. As you know, this bankruptcy case was filed on December 4th, here in this Court, and a Suggestion of that Bankruptcy was filed with the Chancery Court in Delaware advising all of the parties and the Court that the action should be stayed.

(Plaintiffs/Debtors Exhibits Numbers 8 and 9 marked for identification.)

MS. KURTZ: Exhibits Numbers 8 and 9, Your Honor, are the current as of the submission of the Exhibit Notebook. Case histories are what we call “Docket Sheets” for the live actions that Complainant Number -- Exhibit Number 5 and similarly, the one that’s at Exhibit Number 6. Those are Plaintiffs’ Exhibits Numbers 8 and 9.

(Plaintiffs/Debtors Exhibit Number 10 marked for identification.)

MS. KURTZ: In response to the Suggestion of Bankruptcy, there wasn’t a pleading filed, but instead, the Plaintiffs in the Delaware action prepared a letter to the Court to the Vice Chancellor, dated December 8th, that’s been attached as “Exhibit Number 10,” advising the Court that they intended to pursue their claims against the non-debtors.

(Plaintiffs/Debtors Exhibit Number 11 marked for

identification.)

MS. KURTZ: In response to that letter, the Debtor's Counsel in the Delaware action, Mr. K.B. Battaglini of the Greenberg Traurig Law Firm, who is -- has a motion pending in this Court for retention of special counsel to continue that -- it's necessary to continue that representation -- filed a response to the December 8th letter, which you'll find at Exhibit Number 11, advising the Delaware Court, not only of the automatic stay against the Debtors, but also as to the parties related to the Debtors where the claims were aggregated and also advising that Court and all of the parties that the claims were derivative in nature.

As -- if you'll go back, Your Honor, I'll do this in the argument now, but if you'll go back and review Exhibits Number 8 and 9, notwithstanding the Suggestion of Bankruptcy filed December 4th and the letter December 11th indicating that the Debtors' view was that the claims alleged in the Delaware action were derivative in nature, the Plaintiffs continued to prosecuted their claims, not again the Defendants, but against all of the non-debtor Defendants, notwithstanding the Debtors' position and statement to the Court that they belong to the Debtor and that the Plaintiffs should not proceed.

(Plaintiffs/Debtors Exhibit Number 12 marked for

identification.)

MS. KURTZ: The -- as a result of that, Your Honor, I sent a letter, which is Exhibit Number 13, to all of the Counsel in the Delaware action -- I'm sorry, Exhibit Number 12. I sent a letter to all of the Delaware Counsel advising them not to proceed and if they did, that we would come to this Court and seek injunctive relief, that we prefer not to do that, that it was the Debtors' position, as stated by Mr. Battaglini already, that the claims that they pled were derivative in nature and belonged to the estate and should be pursued by the estate, or a designee of the estate.

(Plaintiffs/Debtors Exhibit Number 13 marked for identification.)

MS. KURTZ: The response to that was Exhibit Number 13, where they said essentially they intended to continue to prosecute those claims and causes of action.

(Plaintiffs/Debtors Exhibit Number 15 marked for identification.)

MS. KURTZ: If you'll skip to Exhibit Number 15, which was added in an Amended Exhibit List, Your Honor, today the Plaintiffs' Counsel wrote another letter to Vice Chancellor Strine, reiterating that they intended to go forward with their claims against the non-debtor Defendants and arguing that the stay did not apply.

(Plaintiffs/Debtors Exhibit Number 14 marked for identification.)

MS. KURTZ: Exhibit Number 14, Your Honor, is just various emails indicating that notice of today's hearing was appropriate under the circumstances for a Temporary Restraining Order.

THE COURT: All right.

MS. KURTZ: I'd move for submission of Exhibits 1 through 15, Your Honor.

(Plaintiffs/Debtors Exhibits Numbers 1 through 15 offered into evidence.)

THE COURT: All right.

MS. KURTZ: They've been sent to all of the parties. To my knowledge, on the phone, they were sent to them along with the Exhibit List. They were sent to them by PDF yesterday.

THE COURT: All right. Let me hear from Mr. Paduano to start with.

MR. PADUANO: Your Honor, the documents are all to our eyes authentic. I don't have any objection as to that. We're a little bit handicapped, given the shortness of notice we've had for the hearing to make -- complete so we'd ask the Court at some point for leave to make a supplemental -- to accept the documents introduced for completeness, but as to these exhibits, we don't have objection.

THE COURT: Thank you. We're going to admit them solely for the purpose of the TRO Hearing, not for the purpose of any other hearing, so that if you do need to offer something for completeness, whether we issue the TRO or not, we're obviously going to get to some preliminary injunction hearing, and at that point, all your objections will be preserved and you can offer them at that point, if you need to.

(Plaintiffs/Debtors Exhibits Numbers 1 through 15 received in evidence.)

MR. PADUANO: Thank you.

THE COURT: Thank you.

MS. KURTZ: Thank you. Your Honor, we're here today for Temporary Restraining Order Hearing. We're not asking the Court to decide on the merits today, you know, on two days' notice without adequate time for the Adversary Defendants to respond, to determine unequivocally that the claims -- although we think you could, we're not asking you to do that, that they are unequivocally derivative claims. It is the Debtors' belief based on admissions by the Delaware Plaintiffs themselves, by comments from the Delaware Court, and by following the case law, that the claims are very likely derivative in nature and belong to the estate.

And if the Plaintiffs in the Delaware action

are allowed to proceed on those actions, which they've indicated as late as today, that they intend to do, absent an Order from this Court, that there will be irreparable harm and injury to the Debtor.

And the reason for that would be this is not something where you can say -- proceed and if I'm wrong, we can sue you and we can get a monetary damage. We're talking about litigation proceeding, so to the extent those claims are owned by someone, and we are not able to prosecute them, that would be an irreparable injury. That is, in essence, someone taking over control and direction of an asset of the Debtors' estate where we would have no control over how those proceeded.

The other -- if there's -- Exhibits Numbers 8 and 9, I think, Your Honor, if you go through those, contain adequate evidence for the Court to show that there is an emergency at hand here. There is discovery outstanding. There are answers that are due by these non-debtor Defendants. The Court -- I think it's called the "Court of Chancery" in Delaware and the Vice Chancellor there has already entered a ruling that the discovery should proceed at an expedited basis.

So if this Court does not enter a restraining order, I think that that lawsuit in Delaware will just proceed far enough down the path that when this Court makes

a determination that the claims in the underlying action are property of the estate, we won't be able to "unring the bell."

The standard, Your Honor, is irreparable injury, whether there's an adequate remedy at law, likelihood that we would prevail on the merits, once there is a trial, a balance of hardships and the effect on public interest.

It's clear that the Plaintiffs intend to proceed absent an Order of the Court. The injury, Your Honor, I've indicated is irreparable in that it can't be remedied by monetary recompense. There's no way to say, "We'll pay you back later, if you just let us proceed today."

The Delaware Plaintiffs have argued in their response that they should be allowed to proceed and if at some point in the future you decide the claims are derivative, well they will have been prosecuting those on behalf of everybody. But I think if those claims belong to the estate, the estate can do with them as they please. They could be turned over to the Committee, which, in fact, has already been discussed to the Committee Counsel to investigate and prosecute those claims, as may be appropriate. They could be compromised, settled. They could be negotiated in some way as part of a plan. There

are a lot of different things, strategy or otherwise, that could take place if the Debtors themselves were able to manage their own assets.

The no adequate remedy at law, Your Honor, is very similar to the irreparable injury. Sometimes those two are combined when the Court analyzes whether the standard has been met. Here again, no monetary reward would do, no "unringing of the bell."

The substantial likelihood of success on the merits is the most important element. I'd like to reserve that for last so I could go through the actual causes of action, Your Honor.

The balance of the hardships: The only injury to the Delaware Plaintiffs, Your Honor, would be a delay of time. The injury to the Debtors is an irreparable loss of their legal right to pursue their claim. It would be like giving a hard asset away to someone and saying, "Sell it," and we could always take the money later, but they may not -- they may not know the market.

They may not sell it for the right price. They may not -- we don't know what they would do with it. And so here, particularly because we're not talking about a hard asset, but a legal right, we have no idea what the strategy would be, or how that litigation would proceed, or whether there would be benefit to other creditors that might

be reaped, if, for example, the Unsecured Creditors Committee Counsel were to pursue those claims for the benefit of all of the creditors of the estate.

The truth is, there's probably no harm to the public interest. This is always a difficult element to meet with respect to a TRO, I think, in a Bankruptcy Court, but I think it is always in the public's interest to maintain the status quo until the Court of proper jurisdiction can determine whether there's a right that should be preserved here, and that's what we're trying to do.

With respect to substantial likelihood of success on the merits, Your Honor, you have to -- this Court has already written an opinion, which is squarely on point with our facts here. I don't know that we could have a set of facts any more exact to the facts in the Court's case, *Dexterity Surgical*, at 365 Bankruptcy 690. In that case, the Court looked to the standard set forth in *Tooley versus Donaldson*. It's *Tooley versus Donaldson Lufkin* -- and I can never pronounce the last name, at 845 A2d 1031, Delaware, 2004.

The Fifth Circuit has instructed the Courts in the Southern District to look to state law to determine if claims are direct or derivative and this Court has held in *Dexterity* that actions involving the internal affairs of the "corporation" are governed by the law of the state of

incorporation. Here the claims brought by the Delaware Plaintiffs focus on Deep Marine Holdings, Inc., which is a Delaware corporation.

From this point, Your Honor, the facts of the underlying lawsuit in Delaware are almost exactly like the facts in *Dexterity*. What the Court found in *Dexterity* and following the *Tooley* standard, is that the proper analysis to distinguish between direct and derivative actions should be based on who actually suffered the harm, the corporation or the person bringing the claim and who would receive the benefit if the harm was undone. In other words, once there is a remedy and a recovery, who is going to get that? The individual shareholders or the Debtor themselves?

And seven, analyzing the first prong, it's helpful to ask -- in other words, when -- not just who the name is on the pleading. You know, "I've sued in my own name and I say that I've been injured," but instead, it's helpful to ask, "Has the Plaintiff demonstrated that they can prevail without showing that there was an injury to the corporation?"

And if you go through the specific causes of action in the underlying Delaware case, you can see that they are either directly against the Debtor and/or stayed and we don't really need a TRO, there's been no indication by the Plaintiffs in the Delaware action that they intend to

proceed against the Debtor, for example, on the appraisal rights claims. So while the first cause of action is for appraisal rights against DMT, we don't need a TRO for that. That would be automatically stayed.

The second cause of action, Your Honor, and similarly, causes of action two through six, the first -- the cause of action two is a claim against the officers and directors for breaches of their fiduciary duty. And then three, four, five and six are -- I was going to say "clever," but I don't mean to be pejorative -- sort of interesting variations of breaches of fiduciary duty.

The third cause of action is a claim against the controlling shareholder Defendants for their breaches of fiduciary duty.

The fourth is a claim against the controlling shareholder Defendants for unjust enrichment, which they got as a result of that breach of fiduciary duty.

The fifth one is the claim against the controlling shareholder Defendants for aiding and abetting a breach of fiduciary duty.

And the sixth one is a claim against the officers and directors for aiding and abetting a breach of fiduciary duty.

So they're all really a breach of fiduciary duty claim. And so they allege in their Complaint, Your

Honor, in all of them this -- the ones that are live and in all of the preceding ones that were dismissed where they clearly represented in their pleadings themselves that they were holding derivative claims, that the officers and directors and the other individuals that have been sued, were aiding and approving DMT actions for the private purposes of the controlling shareholders, that would be the Otto Candies entities and also the Kazeminy entities.

These actions allegedly include gross misuse of corporate funds, self dealing, corporate looting, failure to follow corporate formalities, gross mismanagement. They have alleged very specific things, like money going out of the company to some Senator's wife. They've alleged that there were improper dealings on commercial transactions between the insiders and the company that have caused the company to take on additional debt, which then enabled that particular shareholder to flip that debt to more equity than he was entitled to.

But all of those causes of action, you have to prove that there was some damage to the company, and if there was a remedy, if there has been money transferred improperly -- for example, from the company to the Senator's wife -- that would be a fraudulent transfer and the money for that would not go back to the shareholders, who may have been harmed from that, it would go back to the company

because everybody -- all of the creditors and parties-in-interest of the Debtor would be harmed by that and would be entitled to reap the benefit of that money coming back into the Debtor.

And so, the Plaintiffs, while they may have been injured, they have been no differently injured than people similarly situated on whose behalf they should be bringing the claims and the remedy would benefit everyone. It would -- the money would come back to the Debtor and the proceeds -- the remedy for that would benefit all of the Creditors and parties-in-interest of the Debtor.

Your Honor, the seventh -- I just was going to reiterate that argument. I think I can go through it with each of the other claims, but I think two, three, six are identical, Your Honor. They are just some version of the breach of fiduciary duty.

The seventh cause of action, Your Honor, is a claim against the Defendants in the Delaware action for fraud through active concealment of material facts. And you know, I was -- you know, honestly I would say this claim is a little harder to call, but where I think the other ones are absolutely and unequivocally derivative actions for the benefit of the estate, I would say that the seventh cause of action is probably both, something that would be a derivative action for the benefit of all of the creditors

and something where the minority shareholders could argue that the failure to disclose certain information was directly harmful to them, so there would be an overlap there.

But again today, Your Honor, I don't know that we have to make a concrete decision. We have to show that there is a high likelihood that we would appeal on the merits when there is an actual trial and the fact even that this cause of action could be either one and the same with the eighth one, Your Honor. Maybe the eighth one -- or the seventh one less so than the eighth one -- where there is -- where there could be both. I mean, I don't know that it would -- I don't think that there is a single claim in here that belongs just to the Defendants, but I think that seven and eight may arguably belong to both.

But clearly you could show on the fraud through active concealment of material facts, that it is the Debtor that would reap the benefit, if there was a remedy. The -- I think the argument is that the officers and directors falsified corporate documents to cover up improper payments to third parties. I think this was the cause of action where they alleged that there were payments to Otto Candies that shouldn't have been made and that that enabled the company to increase the -- carry a higher debt in favor of Otto Candies, which he was then able to flip for a higher

percentage interest.

So again, they may have been harmed by that. There may be a duplication where there is a derivative action and a direct action, but there is also a derivative action at stake.

The eighth cause of action fraud through silence in the face of a duty to disclosure is very similar, both in terms of the facts that are pled, and the cause of action itself for fraud through active concealment -- I'm not sure what the difference is between active concealment and failure to disclose through silence. I mean, to me, the allegation is that there is a fraud, that they had information they should have disclosed. Bad things were happening. The company was looted. There was financial hardship and damage to the company, which should be rectified for the benefit for all of the Creditors and parties-in-interest.

The ninth cause of action claimed for -- claimed against the controller shareholder Defendants for wrongful equity dilution: This is phrased as if it were the shareholders who were hurt by the dilution of the Debtors' equity. You know, the Court has been clear in the *Dexterity* case and as guided by the Fifth Circuit not to look at how the claims are actually pled or how they're titled, you know, what they called them, but, in fact, to look at the

substance of the claim itself. And the claim for dilution rests on the premise that the Debtors overpaid for assets sold and leased to them by Otto Candies, the same stories again, and then converted that to inflated debt equity and diluting the outstanding shares.

So they have pled it as if they were harmed individually, but they weren't. And it's the company that was harmed by those actions and that would make that a derivative claim.

The tenth cause of action is for an accounting and while that is a direct cause of action, it is a claim against the Debtor and would be stayed by the automatic stay without need of a Temporary Restraining Order from this Court.

So Your Honor, it's a very long way of saying that this Court has exclusive jurisdiction to determine what is property of the estate by arguing -- by focusing the Vice Chancellor Strine in the Delaware Chancery Court on whether the stay applies to Debtors versus non-debtors, it skips a really important issue. I think in general -- and at first glance, if this were a different kind of lawsuit, if it were not one that contained derivative actions, that would be a very strong and compelling argument to the Court in Delaware that: Why are these non-debtors reaping the benefit of an automatic stay?

And the parties there might be left with just the argument about the aggregation of claims, that there is indemnity provisions that sort of -- what we call in Texas, "inextricably intertwined," which they don't use in Delaware, but that kind of argument. In this case, though, I think the more compelling argument is that the claims belong to the estate. So it's not that the actions are stayed against non-debtors. It's that they very likely should proceed, but they should proceed through this Court, either by the Debtor or a designee of the Debtor.

And I think that's important. I understand the Delaware Plaintiffs' argument, which they pled in sort of a notice way, their response, which I also understand on short notice, that you know: Why would we want the Debtors to pursue this claim? I mean, you know, they are the targets here, but the law says that those claims belong to the Debtor and now really the Debtor is a new entity. Courts recognize that Debtors are really a new and different entity than the entity that existed on December 3rd and the difference we have here is that I have a Creditor's Committee who is very interested in these same claims, to investigate them, to determine if there has been wrongdoing by the officers and directors.

So while those claims belong to the estate, I would anticipate from a lot of angles, that there would be

constituencies already active in this case, who may not want the Debtor to have sole control or any control over those claims and causes of action.

THE COURT: Didn't we displace management?

MS. KURTZ: Yes. We've got a Chief Restructuring Officer. That's why I was going to say, so --

THE COURT: So forgetting the Committee for a minute, we don't have --

MS. KURTZ: Correct.

THE COURT: -- the same management people?

MS. KURTZ: We do not.

THE COURT: Okay.

MS. KURTZ: We do not, although to be clear and you know, Your Honor, the former President and the former Chief Financial Officer are still assisting the Chief Restructuring Officer, in different capacities. They both are extensively helping with marketing efforts, either for the sale of the vessels or for investors to invest in the company for reorganization.

I'm not prepared to say today what the long-term likelihood is of employment for those --

THE COURT: But official control is vested, as I recall by our Order, exclusively in the CRO.

MS. KURTZ: And he is exercising that exclusively.

THE COURT: Okay.

MS. KURTZ: So he would either keep those, or if there was substantial push back and/or an order from this Court, we have had preliminary discussions with the Unsecured Creditor's Committee, you know, so that they could do conflicts checks, if we -- if we needed to punt that particular litigation or investigation, would they be prepared to take that?

So we believe strongly that the claims belong to the estate for the benefit of all of the creditors and parties-in-interest. We understand that there could be an argument that the Debtor may not be the perfect person to pursue those.

Our argument back would be: We have a Chief Restructuring Officer. We have independent management today. If you're still not satisfied, we have an Unsecured Creditor's Committee. Those make the facts very different than they were on December 3rd and prior in time.

THE COURT: All right. Mr. Paduano, what kind of response do you have?

MR. PADUANO: Your Honor, thank you very much. I want to make it very clear that what's pending in the Delaware Court is not a derivative action. They're direct claims against the Defendants there. And the Counsel has correctly stated that we have disclaimed any interest in anyway of pursuing anything in light of the bankruptcy stay,

any claims against Deep Marine Holdings, Inc. or Deep Marine Technology.

So Your Honor, then to the extent the argument and the application for this Court is based on the analogous of how we've got derivative claims, it's just not the case. Moreover, the reliance the Court has just heard about Your Honor's decision in *Dexterity* and the Delaware case that underlies that concern shareholders. We are not shareholders of the Debtors. Our shares have been canceled, in a word, and the Court can look at Exhibit "O" to my affidavit. It shows the merger of what our interest to another entity and don't have an interest right now, the way the law works in Delaware, in either of the Debtors.

And clearly, Your Honor's decision in *Dexterity* and the Delaware *Tooley* case be to shareholders and then was trying to evade the automatic bankruptcy stay. We're not shareholders. They and another machination, which I'll get to in a second, cancelled our shares by doing a short form Delaware merger.

And Your Honor, that gets to the point of what's going on here. What's going on here, as Counsel says, they asked the Delaware Court to stay our action. They filed the Suggestion of Bankruptcy. That is attached to Exhibit F of my Affidavit, giving notice once the Delaware Court was going to allow the case to proceed,

actually on an expedited basis, that these entities that have been merged literally out of business, were going to file for bankruptcy and the Delaware Court, as Counsel correctly stated, set an expedited schedule for discovery.

And the reason for that is that these Defendants here, specifically Mr. Candies and Mr. Kazeminy, the Candies' entities, Mr. Candies and Mr. Kazeminy, we think seriously made misrepresentations to the Delaware Court. This dispute started in the fall of 2008 when on a confidential basis, a source came to our clients. It's a very small corporation with very few shareholders, that there was wrongdoing. Our client, under Delaware law, made a demand as they must to the corporation asking that the corporation investigate the wrongdoing and see if there was merit to it, and we made that demand.

For more than five months, nothing happened with that demand. In the interim, we sued. We did, in fact, file a derivative action in Delaware. And the Defendants met that that action with a Motion to Dismiss, saying that our client was not ripe, that dismissal was because the Special Committee Minister Battaglini was counsel to -- Greenberg Traurig was Counsel to -- said it hadn't had enough time after three months to complete its work. So the Delaware Court dismissed without prejudice and allow the Special Committee to complete its work.

The Special Committee completed its work on June 30th, 2009. The next day -- there's a typo in my affidavit, Your Honor. I apologize for that. The next day on July 1st, 2009, our shares were cancelled -- our clients' shares were effectively cancelled and there was a short-form Delaware merger, which the Kazeminy entities and the Candies entities were entitled to do because of their vast majority holdings in this closed corporation.

Thereafter, Your Honor, we filed the current action that the Defendants seek to have, in effect, stayed because they believe in some form that it runs afoul of the stay, and our claims don't. This was, as they say, the Court when it takes the time to go through our papers, there are a few shareholders. We identified wrongdoing. The company had been valued as we pled in Delaware at more than 100 million dollars -- derivative transaction for more than 100 million dollars. On July 1st, 2009, the company's value was nothing. There's a valuation that's attached in the papers here. I'm sure the Court noticed a merge in Exhibit O that shows their shares were worth a dollar.

And Your Honor, we've got serious claims against these non-officers, non-directors of the bankruptcy entities for what they've done to our shares. They had duties to us. They have fiduciary duties to us as majority shareholders, as organizers of the investment, a host of

duties and frankly, the reason that they wrote to your Court seeking a TRO is because the Vice Chancellor Shrine is, I think, going to hold her feet to the fire and say that that entities that are not encompassed by the Bankruptcy Court stay are entitled to that protection, and that includes Mr. Candies, Jr., Mr. Candies, III, Mr. Kazeminy, DCC Ventures and JK Holdings Corporation and KOC, Otto Candies, LLC and obviously there's issues with the former directors, who might have greater claim to the protection of this Court, but I don't think that the organizers of the investment. Outside investors, who were neither directors, nor officers, who were employees of the bankrupt entities, I don't think they get to enjoy the stay at all.

So we do have these direct claims because they have done things that have destroyed our values. Counsel has conceded that the ultimate chance we take of the success on the merits by the Debtors here is nil. She just said that some of these claims may be joint, even if their analysis somehow they've got a derivative action in Delaware, even though it's not apprised, at some point we get to pursue those claims against these people who have wronged us and I don't see how a stay can be issued when we've got a concession that claims may be pursued at all.

As to the argument somehow that there's irreparable injury here, these entities, as far as we know

in Delaware, we've been deprived of lawsuit, has no idea what has happened to them at all, except for the valuation that showed them at no values as of July 1st, 2009. I don't know how they could possibly be injured by re-pursuing claims against non-officers, directors and employees, agents, in another forum at all.

And this concept, somehow that the claims that we have regarding our shares and what was our seven million dollars that we were entitled to, the value of our shares before this deceit started, somehow belongs to the corporation or to other creditors, I don't see that at all. I don't see how they could possibly apply because again, our claims don't run against the corporation. Now in light of the stay, we can't pursue, but clearly against the actions that Mr. Kazeminy took and Mr. Otto, the entities and others that they took, we clearly get to pursue those.

They ran the companies as their Candy Store and we got close to them and came very close to firming things up in Delaware. They cancelled out shares -- a very aggressive act. It clearly got the attention of the Delaware Court, which is why we're on the phone today because I don't know how they're going to explain that result to the Delaware Court. So the concept somehow that these claims should be -- our claims in Delaware should be stayed and surrendered to Counsel that's being retained by

these two entities that were worth a dollar as of July 1st, 2009 because of being pursued by Counsel, that is nominated by the Debtors to pursue them as to others where they're speculating that at some point their bills are being paid by Mr. Kazeminy and Mr. Candies, who orchestrated these entities and do stuff to invest in the entities and have done everything to frustrate our interest into that. The concept of this claim is being pursued diligently, fairly -- analyzed diligently and fairly at all, so we cannot -- I don't see how Counsel can possibly overcome that conflict in any way.

So even if there were Proof of Claims ultimately it wouldn't be the estate controlled by these same entities that would be pursuing those claims. So, Your Honor, this is not a situation where the *Dexterity* decision applies. It's not something where you've got parties, us, in front of you who are trying to end around the stay at all. I think they've been chewed by half by cancelling our shares. They began arguing that we were shareholders trying to get around your stay, but we're not. We're former shareholders. They kicked us out. We don't have a claim, according to them if they're to be believed as to the equity or debt or assets or anything of Deep Marine Holdings and Deep Marine Technology and the four special purpose entities that we're unfamiliar with, that are part of the action in

your Court. They kicked us out.

So we'd like to sue them, but you know, the stay is there, but at the end of the day, if they're right, they've short-form merged us out of our equity positions. You know, we don't have a claim there. We have an appraisal proceeding in Delaware that's already been commenced, that's starting, that under Delaware law is supposed to go forward to assign a value, their value, to our shares we would clearly then say because that involved the Debtors of Your Honor's Court.

So Your Honor I don't think there's a record in front of you to take the extraordinary action of truly taking away the jurisdiction of the Court in Delaware that's got these claims in front of it that is dispute has been kicking around in various forms and so for well over a year and we have the Court in Delaware to help us. We got in the Court in Delaware to expedite things because the assets have been taken away from us and now we must pursue these individuals.

Our task is quite difficult and we take this as just another effort to make it that much more difficult and much more expensive for our clients. So we'd ask the Court to deny the TRO Application in its entirety to the extent that if the Debtors want to go forward after some discovery to see what actually is going on and where the

right to remedies actually lie after discovery, we could appear back before the Court for a preliminary injunction, I would ask that the most that this Court does is strike at this time.

Thank you.

THE COURT: All right. Thank you.

All right. I'm granting the Temporary Restraining Order and let me give the reasons why I'm going to grant the Temporary Restraining Order: Actually, I oftentimes deny Temporary Restraining Orders because I think that we need to be extraordinarily careful in issuing one, but having reviewed really the four corners of the Complaint to determine what the story is, I think that the Plaintiffs' view of what the Complaint says -- not maybe what it could say, not maybe what somebody wants it to say, but what it says unambiguously largely states claims that are property of the estate.

I am guided today by Fifth Circuit law that says that if something is arguably property of the estate, that it is a violation of the automatic stay to exercise any control over it or to take any action against it and I refer the parties to the *Chestnut* case at 422 F.3d 298.

We have jurisdiction over this matter under 20 U.S.C. Section 1334. It is a core matter under 20 U.S.C. Section 157 in determining whether to grant a Temporary

Restraining Order, I will follow Fifth Circuit law under *Speaks versus Cruz*, at 445 F.3d 396, a 2006 Fifth Circuit case, the standard for standard, substantial likelihood of success on the merits, a substantial threat of irreparable harm if the injunction is not granted, that the threatened injury to the Movant outweighs any harm to the Non-Movant that may result from the injunction and that the injunction will not undermine the public interest.

First, is there a substantial likelihood of success on the merits? My answer is that I think there's a pretty overwhelming likelihood of success on the merits as the Complaint is now pled. Now I think that Mr. Paduano makes persuasive arguments that there may be a complaint that they can file that would not violate the automatic stay and when an amended complaint gets presented to me, if it gets presented before the expiration of the TRO or if it gets presented at the Preliminary Injunction Hearing, this ruling may change and it may change very dramatically for those of you that are interested in the outcome.

I'm ruling on this Complaint, not really on the Complaint described by Defendant's Counsel. Let me just go through -- and I'm not going to go through every paragraph of the Complaint right now, but I'm going to go through some of the Complaint and just say why I think this is a fairly obvious decision. The Complaint starts off by

saying, “This action is filed by the victims of a conspiracy to loot Deep Marine Holdings and its subsidiaries, including its wholly owned subsidiary, Deep Marine Technology.” It’s a corporate looting case. That is what is pled.

When I do to the causes of action, I think everybody agrees that the cause of action for appraisal rights is stayed. The second cause of action is a claim for general breach of fiduciary duties, without really describing what those breaches are, but referencing back to paragraphs 1 through 148, that largely describe the looting, the self-dealing, the misuse of corporate funds, and describe them in way that, you know, frankly are very persuasive and offensive if true. I’m obviously not deciding what’s true, but there is a major corporate looting case is pled here.

When I look at the third cause of action, it gets more specific than the second. Paragraph 157, however, goes and says, “Otto Candies sold vessels and equipment, some of which were not seaworthy and required hundreds of thousands of dollars to repair to DMT at inflated prices while Otto Candies was a controlling shareholder of DMT and while Otto Candies, III, was a member of DMT’s Board of Directors. By reason of the actions described above, Otto Candies and Otto Candies, III, breached their fiduciary duties to DMT by engaging in a classic case of self-dealing

thereby looting DMT and its subsidiaries, unfairly diluting minority shareholder Plaintiffs and diminishing the value of Plaintiffs' DMT stock."

This cause of action has nothing to do with the theft of the shares. It has to do with looting of the corporation. The unjust enrichment is the same kind of Complaint.

The fifth cause of action, again we don't get the specifics. We're incorporate prior paragraphs, but by incorporating them in each of these situations as the basis for the cause of action, what the Plaintiffs rely on is injury to the corporation for the measure of the damages to the Plaintiffs and when they rely on injury to the corporation as the measure of the damages to the Plaintiffs, they are stating a cause of action that in my mind -- at least arguably under *Chestnut* and I think probably more than arguably, belong to the estate to bring.

The seventh and eighth causes of action are sufficiently ambiguous that I don't know what they are. Again, they incorporate the prior paragraphs. By incorporating the prior paragraphs, they arguably are property of the estate and that is the standard I am required to follow under *Chestnut*.

The wrongful equity dilution, I agree almost precisely with the way that Ms. Kurtz described it, which

although it is described as a shareholder dilution, what it says is that the shareholders were diluted because assets of the corporation were diverted out and by doing that, it diluted the value of the shares by diversion of corporation assets.

And finally, of course, the accounting is the direct claim against the Debtors.

I find that as pled, every claim is either actually or arguably a claim that is owned by the estate or is a claim against the Debtors. I therefore find there is a substantial likelihood of success on the merits.

With respect to a substantial threat of irreparable harm if the injunction is not granted, I find there is irreparable harm for two primary reasons. The first is: The law holds that a violation of the stay is by definition irreparable injury. So if they are violating the stay by exercising control in violation of Section 362(c) -- excuse me, 362(a), that is, in fact, a violation of the stay and it satisfies a substantial threat of irreparable harm.

Second, I think there is irreparable harm if the injunction is not granted because in all likelihood, prosecution of the cases is a void act, and if we get to a prosecution and a result and it’s void, that result is going to create such a mess, I don’t think we’ll ever be able to put Humpty Dumpty back together again. It just makes no

sense to allow it to proceed until what is pled is what they have a right to proceed on.

Three, that the threatened injury to the Movant outweighs any harm to the Non-Movant that may result from the injunction. I think absolutely that is the case from what I have seen. The Debtor owns these claims, at least some of them without question. All of them the Debtor arguably owns or the Debtor is a Defendant in. It is unreasonable to believe that somebody else should be able to control that without injuring the Debtor and moreover, the probability that these actions would then ultimately be determined to be void makes the problem even worse.

I frankly don't see any harm to the Non-Movants under this situation. They want to proceed with litigation, but they have not argued or shown me any harm to them in delay other than that they want to move ahead, and I understand wanting to move ahead and we're going to set things relatively promptly here, but wanting to move ahead does not constitute injury. There just isn't any injury that at least has been argued to me of holding up, taking a breath, and seeing what's going on in this situation.

Moreover, an awful lot of what is argued as the injury has to do with the fact that "The crooks are in charge of suing the crooks," is the way that I'm going to put it. I don't think that's what's going on in this case.

One of the very first things that we did was we ordered that the people that are being complained about were divested of control over the case.

I know that the folks on the phone don't know me, but I probably have a reputation down here for turning down Motions to Compromise Controversies more than any other judge in this state does. I do turn those down unfortunately for people fairly regularly and the probability of me rubber stamping a compromise that is going to allow these folks to walk away in the light of -- if I get a good objection to it, it's fairly low. I mean, I take my 9019 responsibilities with a great deal of seriousness and perhaps more seriously than some people would like for me to do, but I think there probably shouldn't be a whole lot of worry, that I'm going to end up rubber stamping a 9019 motion.

And I would also tell the folks, you need to come oppose it. It's not that I'm just going to go out on my own, but opposed 9019 motions here get treated with a great deal of serious evaluation.

Finally, with respect to public interest, I think the Fifth Circuit standard is that the injunction will not undermine the public interest. I don't think this one does, so I'm going to issue the Temporary Restraining Order. It obviously doesn't last very long. This is the first TRO

that I've issued since the new rules. I don't know if it's a 14-day standard or a 10, but I'm going to look it up.

Let me see. Fourteen days under Rule 7065 as applying Rule 65(b)(2), so we need to have a hearing within the next two weeks.

Mr. Paduano, I'd rather set this at your convenience, since you're going to be traveling. Can you tell me a convenient time for you during the week of February the 1st and I'll try and get you a hearing on a day that's convenient to you?

MR. PADUANO: It's the -- sorry, Your Honor. I'm just looking.

THE COURT: And obviously, you're welcome to participate by phone, but I suspect you're going to want to be here.

MR. PADUANO: Yes. I will be. One second, Your Honor, please?

(Pause)

MR. PADUANO: Your Honor, I take it the Court still has discretion to move things out a little bit. Would February the 8th work, the Monday?

THE COURT: I can go to the 8th, if you want to consent to the entry of the TRO, but I can't if you won't.

MR. PADUANO: We will consent to it.

THE COURT: Okay.

MR. PADUANO: We will consent then up to the date.

THE COURT: Right. Well, you're going to consent that I'm going to issue an TRO for longer than the 14 days, is what you're going to consent to?

MR. PADUANO: Yeah, I understand the Court's ruling is we do consent to the additional period of time, yes.

THE COURT: Okay. I actually have time on the 8th. I think a trial must have cancelled. I'm not sure why. I've got -- let me just open a couple of docket settings I've got and see how time consuming they're going to be. What I proposed to do is to limit each side for maybe an hour and a half for their preliminary injunction presentation, maybe two hours, and see if that works for everybody? Does that work for both sides?

MR. PADUANO: Yes, Your Honor.

MS. KURTZ: Did -- I'm sorry, Your Honor, did you give us a time on the 8th? I've --

THE COURT: Well, I'm going to look at that. I'm trying to figure out, can you live with an hour and a half to two hours for your presentation?

MS. KURTZ: Okay. I'm sure. I mean, two hours would probably be better, but I usually go under. That's fine.

THE COURT: I can give you two hours. How do you

look on the 8th?

MS. KURTZ: And Your Honor, I've got a motion -- I know it sounds small, but I've got a Motion for Relief from Stay hearing set -- let me see if that's the 8th or the 9th. I apologize. Give me one minute. No, it's the 9th. I'm clear on the 8th, I'm sorry. I'm clear on the 8th.

THE COURT: Let me see what I've got. If I set this for 2:00 o'clock in the afternoon and then we go till 6:00, will that let you take a morning flight in, Mr. Paduano?

MR. PADUANO: Your Honor, whatever time is convenient for the Court. I'll probably be there the day before.

THE COURT: We can start it -- we can start at 10:45 in the morning, if you-all want to. We'll take a fairly -- at 1:30 I've got a hearing that's going to take about 15 minutes. I've got a 9:00 o'clock. I just want to be sure it's over before everybody shows up, so if you-all want to start at 10:30, 10:45, and then I'll give each side two hours.

MR. PADUANO: 10:30 would be great, Your Honor.

THE COURT: All right. We'll issue the TRO. I'll get all the findings of fact. I've got to incorporate them actually into writing, I think, under the rules for that, but I will get that done. The TRO will probably go out

tonight. If not, it will go out in the morning.

We'll set the hearing for February 8th at 10:30 in the morning on the Preliminary Injunction. By agreement, each side is going to be limited to two hours for their control of court time that will include your direct examination of any witness and any cross-examination. It will include any opening and closing. I'll read your materials beforehand to try and save you having to do an opening. And we'll have the full time allotted.

Just be sure to reserve that time for me, Ms. Smith.

Anything else we need to do today?

MR. PADUANO: Would the Court entertain a -- would it be possible to take some limited discovery in aid of our hearing?

THE COURT: Absolutely. You're entitled to all the discovery that you-all can notice up and get done. If you want me to compel some right now, I'd probably prefer that you-all confer first and if you don't reach an agreement, file a Motion to Compel and I'll get discovery.

MR. PADUANO: Great. We'll do that, Your Honor. Thank you.

MS. KURTZ: The discovery, Your Honor, I just want to be clear, would be in connection with the ownership of the claims?

THE COURT: Well, it's going to have to be connection with the merits of the preliminary injunction that's being sought.

MS. KURTZ: Right. But I mean --

THE COURT: So I don't want to say it's only that because, I mean, there may be some other issues. It isn't obviously an underlying merits discovery, but there may be things that are broader than who owns the claims.

MS. KURTZ: You answered my question in your comment. Thank you.

THE COURT: Thank you. Yes, sir?

MR. MOAK: Your Honor, on behalf of the Committee, obviously we're not parties to the action, but we would like the opportunity to participate at the preliminary injunction hearing. Obviously, Ms. Kurtz --

THE COURT: Whose side are you going to take?

MR. MOAK: We came today to speak in support of Mrs. Kurtz' client, the Debtors, and we will do that at the preliminary injunction hearing and we will coordinate with her, so as not to duplicate our effort. In part, the reason I didn't speak today, Your Honor, was because she basically covered every topic that I would like to have covered, but --

THE COURT: I'm not sure that you'll be a party to it, but if you -- if the other side doesn't object, I'll

deal with it, but certainly I'm going to make you get time from her, out of her two hours.

MR. MOAK: We understand, Your Honor, and we'll coordinate with her. I appreciate that.

THE COURT: But I don't want to make a statement today because I don't know what the other side's position will be as to whether you should be allowed to participate or not.

MR. MOAK: It may be then, Your Honor, in light of that, we may file a Motion to Intervene. I'm just going to try to give that --

THE COURT: If you file a Motion to Intervene, I'll take it up at that point.

MR. MOAK: Thank you, Your Honor.

THE COURT: Thank you.

Anybody else need anything clarified today?

(No audible response.)

THE COURT: Okay. Thank you for the presentation. I appreciate getting educated about this. I will get a TRO out, I hope before I go home tonight.

Thank you.

MR. PADUANO: Thank you, Your Honor.

(Proceeding adjourned at 4:12 p.m.)

* * * * *

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s lmartin

_____

JUDICIAL TRANSCRIBERS OF TEXAS, INC.

JTT JOB/INVOICE # 28061

DATE: JANUARY 25, 2010

EXHIBIT A

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

FLI DEEP MARINE LLC, BRESSNER PARTNERS LTD., LOGAN LANGBERG AND HARLEY LANGBERG	:	
Plaintiffs,	:	
vs.	:	Civil Action No. 5020-VCS
PAUL McKIM, B.J. THOMAS, DANIEL ERIKSON, FRANCIS WADE ABADIE, OTTO CANDIES, JR., OTTO CANDIES, III, EUGENE DePALMA, LARRY LENIG, JOHN ELLINGBOE, BRUCE GILMAN, JOHN HUDGENS, NASSER KAZEMINY, DCC VENTURES, LLC, NJK HOLDINGS CORPORATION, NKOC, INC., OTTO CANDIES, LLC, DEEP MARINE HOLDINGS, INC., AND DEEP MARINE TECHNOLOGY, INC.,	:	
Defendants.	:	

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Chancery Court Chambers
New Castle County Courthouse
Wilmington, Delaware
Monday, November 2, 2009
10:00 a.m.

BEFORE: HON. LEO E. STRINE, JR., Vice Chancellor.

OFFICE CONFERENCE

CHANCERY COURT REPORTERS
500 North King Street - Suite 11400
Wilmington, Delaware 19801-3759
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- - -

THE COURT: Good morning, everyone. You may proceed.

MS. HARRISON: Good morning, Your Honor. Kate Harrison from Paduano & Weintraub, counsel to FLI Deep Marine LLC, Bressner Partners, Ltd., and the Langbergs, former minority shareholders of approximately 5 percent of Deep Marine Holdings, Inc., and its wholly owned subsidiaries Deep Marine Technology, which we call together DMT.

Plaintiffs were most recently squeezed out of DMT in a Delaware short-form merger. The defendants are DMT, the controlling shareholders and their entities, the current and former officers and directors who have systematically stripped plaintiff of their entire $1.75 million investment and their legal rights to complain or even inquire about what happened to the company they invested in.

Plaintiff invested approximately $1.75 million in 2002 in a startup company to provide subsea services in the oil and gas industry -- offshore, mainly, Gulf of Mexico.

THE COURT: I've read everything. We're at a scheduling conference.

What is it you're seeking to enjoin?

MS. HARRISON: We want to make sure that what remains of the assets of DMT are not taken out of the jurisdiction so that we are left with absolutely no remedy.

We fear that DMT and these defendants are right now in the middle of selling the last few valuable assets -- the vessels -- and that they may be selling them under market value and that the proceeds will disappear. So we seek to -- we seek to enjoin only sales out of the ordinary course, and we just ask that the proceeds be held in escrow and we seek expedited discovery.

THE COURT: Okay.

MR. MAIMONE: Your Honor, Mike Maimone for Deep Marine Holdings and Deep Marine Technology.

What plaintiffs are seeking here is, in my view, unusual. I don't -- we view this as a statutory appraisal action. We think all the issues that are set forth in the complaint should be dealt with in the appraisal action. I think the Glassman decision in the Supreme Court holds that.

Actually, the fiduciary duty claims are probably subject to a motion to dismiss by my friends on the defendants' side, since I represent the

company, the company has no fiduciary duty. But in connection with the current application, plaintiffs base their application on pure speculation. Deep Marine is an operating company. I was told by Deep Marine that there's no plans to liquidate. There's no plans to dissolve. They're merely trying to raise cash to keep the operations going.

The plaintiffs, as a form of stockholders, have taken the status as creditors. In the Alabama By-Products decision, the Supreme Court held that if you perfect your appraisal rights -- we're not conceding that everyone perfected their appraisal rights -- but to the extent that any of the plaintiffs perfected their appraisal rights, they're creditors of the company and we believe they have full rights of creditors. They have the fraudulent conveyance laws to protect them -- 174 to protect them. They have all the relief that the Court of Chancery recognized in North American Catholic to protect them.

So we don't really see the reason to enter a TRO because Deep -- there's no -- based in the complaint or any of the papers tendered, a TRO -- Deep Marine is an operating company. It's going forward.

If that changes, then plaintiffs can enforce their rights at that time. Right now, plaintiffs haven't a ripeness argument because nothing is happening. Plaintiffs are dealing with speculation because they don't know anything and there's nothing really to know. This is a damages action, where we can just move forward in the ordinary course. My friends on the defendants' side could file whatever motions they deem appropriate in connection with a motion to dismiss. The company will deal with the appraisal action appropriately, and we can just move forward with the appraisal action and whatever motion practice my friends feel --

THE COURT: When the appraisal notice was given, was the special committee report disclosed?

MR. MAIMONE: My understanding is it was not.

MS. HARRISON: As you can tell from the chronology of the case, the company announced that the committee had reached its conclusion. It did not give anybody the report, and the very next day it announced the short-form merger. So it thereby ruined our standing to continue the derivative action the very next day. So we find the timing of that highly

suspicious. I think, when Vice Chancellor Noble dismissed our derivative action without prejudice, he assumed that we would be back.

THE COURT: Did no one get Mr. Miller on the phone?

He is on the line.

Okay. Here's what we're going to do, folks. I'm not setting up any kind of injunction schedule. I don't know what we would enjoin. On the other hand, I am granting expedited discovery. I'm not exactly clear -- off the record.

(Discussion off the record.)

THE COURT: Back on the record. This is a little wacky situation. I don't want -- I will tell the defendants -- individual defendants -- don't be looking for me to be sympathetic to motions to stay discovery. Discovery is not going to be stayed. I'm allowing expedited discovery because, frankly, this is a record that creates a situation that -- at least a colorable perception that people are horsing around. I mean, the moving papers, with all fairness to the defendants, telling me that they somehow got vindicated in the derivative action, that's not what happened at all. That is not what Vice Chancellor

Noble's decision says. What it says is people goofed up. It's not the first time I've seen people goof up like this. Folks who don't consult with Delaware lawyers early on in a process sometimes, when they make a demand, they go, "Oops." But the point is, there's basis under the law to challenge even a special committee's investigation. But you have to wait until it's done.

As I understand what the defendants did before Vice Chancellor Noble is say, "Look, the law's the law." They goofed up. I believe Vice Chancellor Noble indicated some doubts about the independence of the committee. He let the process go forward. Frankly, the defendants made arguments about the amount of time they needed. It's not clear to me. You can all shed light on this later on whether the defendants were forthcoming about when they were planning the merger, whether they were at all planning a merger during the pendency of the suit before Vice Chancellor Noble, whether they let anyone know about it. Very interesting circumstances.

It may well be that all of these things can be litigated purely in the context of the appraisal. But the reality is, that's why discovery

should go forward because, if the defendants' -- individual defendants' -- argument is it all got bought into the respondent, but you have to value all these claims in the appraisal, well, then, the discovery should go forward because it's essentially a merits discovery. It's going to be relevant to value.

I also think there is some concern about the respondent and the ability of the respondent to answer these claims. You know, it would be a much more edifying record, if somebody wants to put out an appraisal notice with the actual report, if there is such a report. Who knows at this point? What there was some sort of exculpatory release apparently saying, you know, nothing happened that was actionable and there's a short-form merger and I think people got offered pennies.

MS. HARRISON: One penny a share.

THE COURT: A penny a share.

So, it's a rather odd circumstance. I have read Glassman. I'm very familiar with the 253 jurisprudence. I don't know what the exception is for fraud, other sorts of things. But I won't rule out at this stage the following possibility. There's a derivative action pending. Folks made a procedural

goof-up by making a demand. A special committee is formed in order to delay, doesn't really do a professional job or an independent job, issues a report which -- to somebody, but not to any of the people who brought the derivative claims. And while it gets the case dismissed on the grounds of delay, that we need to investigate this and, immediately upon concluding this thing, a short-form merger is done to excuse -- to essentially wipe out the claim. We do know that there is jurisprudence that says, when a merger is done specifically for the purpose of getting rid of claims, that that doesn't really get rid of the claims. If there's ever a circumstance again where people have played themselves into a perception, I could not on a motion to dismiss rule out the inference that these folks wanted to get rid of these claims and did a short-form merger. You know, mergers are powerful things. They're not just thought of instantaneously. This one was done fairly shortly after Vice Chancellor Noble considered a motion to dismiss and granted it.

So what I would also urge on the plaintiffs' side -- and I think I get into the Delaware law. There's really no need. We're seeing

this more and more in the Court. 7 million counts. I mean, I'm not saying -- you know, aiding and abetting against the officer and director defendants. If you're an officer and director, there's a term for when you aid and abet a breach of fiduciary duty. It's called a breach of fiduciary duty. It's not -- we don't have like everybody is guilty of a breach of fiduciary duty, plus because they did it in concert with their fellows in aiding and abetting claim.

I don't know what this fraud through concealment is. How is that different from breach of fiduciary duty? Fraud through silence in the face of disclosure. A claim against controlling shareholders for wrongful equity dilution. Claim against controlling shareholder defendants for unjust enrichment. I don't know how that's different from the third cause of action, which is claims against the controlling shareholder for breaches of their fiduciary duties. It strikes me that, if they didn't breach their fiduciary duties, there was no unjust enrichment that, with respect to wrongful equity dilution, what you're arguing is, there is a breach of fiduciary duty and therefore these were self-dealing

transactions that wrongfully diluted folks because the transactions were improperly priced or motivated. These are not really separate causes of action.

Accounting. Accounting is a remedy. You can put that in the wherefore clause, I believe. You can say, wherefore because there have been breaches of fiduciary duty, we need to get to the bottom of this. There ought to be an accounting. All I'm saying is, you're going to get expedited discovery. I would urge on the cost sides of this -- I don't know how big this company is or what it is. All I do know is two, four, six, eight, ten, 12, 13, plus Mr. Miller on the phone, 14 lawyers, let the record reflect. And I may have miscounted. I'm not that great at math. Fourteen lawyers already. This is an expensive morning; right? For the cost of this morning, you could have doubled the consideration given in the merger to the plaintiff. Right?

You know, only clients know what really happened. Obviously there are professors of philosophy who would say even they don't actually know what happens. They have a perception of what happened. But my point is that, you know, one of the things that our profession really has to do is, you

always have to take -- you want to be vigilant in representing your clients, but you actually need to challenge them and talk to them. I don't know how really valuable this is from the plaintiffs' side. I don't know if this was a business going down the drain. There's obviously the possibility, for example, that these people did trivial -- even if you accept the complaint as true -- did trivial self-dealing transactions around the margins because there was a political buddy. But that, in the scheme of the world, they don't add up to a lot of economic value.

I mean, you know, is this case really about Mr. -- former Senator and Mrs. Coleman? If it's a matter of that and some sort of principle, the case might be settleable on that basis. Give to the people who were cashed out the maximum amounts allegedly overpaid to Senator Coleman and Mrs. Coleman. As I get it -- I might be wrong -- but it wouldn't be gazillions of dollars. It might be nice for people like around here who work for the state and yearly pay cuts, we would like to have some supplement of 25,000, or whatever it was a month, or $75,000.

But my point is that out of that does

not an appraisal case make. These obviously -- these things with boats, though, and other things, at first I couldn't -- Mr. Candies' name got me distracted because I was trying to figure out the synergies between a maritime company and some sort of candy company, until I realized this was just a person's name. It's like oh, there's Candies. A venerable chocolatier in Minneapolis. Everybody at Christmastime gives a box of Otto Candies to their kids.

But what I'm saying, you have to size up what you get out of this rather than you're just angry. I'm not saying that's what's motivating it. You have to figure that out.

On the defendants' side, again, you know, you can't represent your clients without doing a reality check on what went on. And sometimes things that -- you know, sometimes things that look slick are perfectly fine. And when it's all said and done, it all looks above board. Obviously, when things that are done are slick, they look slick. The genuinely slick don't look slick because they figure out ways for it not to look, you know, so immediately suspicious. This is a situation where people managed.

Might have been the best thing in the end. I don't know. But obviously was a course of events that didn't look exactly edifying, particularly a short-form merger like this where the economic consideration given to the people being cashed out was basically bupkis.

So, before you get into discovery, you may want to figure out where your respective positions are. What are the plaintiffs seeking out of this? I don't know how many stockholders there were in general. Obviously the investment -- is the investment of all the cashed out people 1.7 million?

MS. HARRISON: No. That's just our clients. There are a couple of other -- not very many minority shareholders. There are a couple of other groups.

THE COURT: You don't know what their percentage holdings were in comparison to your clients?

MS. HARRISON: Well, at the end of it, because of the short-form merger, they held 90 percent, we held 5 percent.

THE COURT: I'm just talking about like in terms of cash in. You're saying your clients

put in 1.7 million to get in?

MS. HARRISON: I don't know that. But I know there is a group -- there is another group of minority shareholders --

THE COURT: Did they perfect appraisal rates?

MS. KRAFT: DeepWork is here, Your Honor, we filed a tag-along action and we did perfect our rights, is our contention, and that was somewhere in the vicinity of $800,000. A little bit over a million. I'm still trying to figure that out.

THE COURT: So there's another action. Have I gotten papers in chambers about that?

MS. KRAFT: They were sent over on Friday. My understanding -- and I spoke with counsel for the FLI plaintiff earlier -- is that there are a couple other minority shareholders. This was not filed as a class action. That's another consideration for amendment. We haven't really spoken about that.

THE COURT: Well, I think one of the things you ought to be talking about is coordinating whether it's a class action or not. Obviously it would be better to have one complaint. But between your two groups, do we essentially have all the other

minority --

MS. HARRISON: I think a couple of the defendants also have -- were minority shareholders.

THE COURT: I'm assuming they don't care about that.

MS. HARRISON: Right. But what I'm saying is, I think it's a very small universe of minority shareholders.

MS. KRAFT: We're thinking maybe about a group of five or six. Would that be correct?

MS. HARRISON: Yeah, at most.

THE COURT: Five or six, in addition to your groups?

MS. HARRISON: No, I think it might be DeepWork and maybe one other group only.

THE COURT: Is Mr. McKim part of one of these groups?

MS. HARRISON: Mr. McKim is a defendant.

THE COURT: I understand that. I get that he's a defendant. Your papers didn't seem particularly hostile toward him.

MS. HARRISON: Well, because we believe he was a whistleblower, in a sense.

THE COURT: Right.

What I'm trying to talk about here is -- in a room where we got -- what did we say? --we counted up with Mr. Miller, 15 or 14 lawyers -- is, as we go forward, there will be material amounts of money spent.

MS. HARRISON: Absolutely right.

THE COURT: All I'm saying is, sometimes what people want -- you know, they don't want to be suckers -- is sometimes, if you focus early on what's at stake, what the costs of enforcement are and all that kind of good stuff, you know, it may be like everybody gives their clients litigation budgets and all that kind of stuff. That before you go spend hundreds of thousands of dollars, as you will in discovery, no doubt, that you begin to think about, you know, what it is. Sometimes people's investments in -- "Like I at least want my money back and I think these people are jerks and I will never invest with them again. If I can at least get the skin that I put in the game back or something like it, then I'm willing to move on because I'm realistic about the world." You know, I don't know. I don't know what that would mean in terms of the defendants. I don't

know any of it.

I do know, as professionals, if you're representing people who are being rational, now is the time, rather than later, to think about it. What I'm saying to the defendants is, this is not a surgical case. This is not one you're going to come in and say this is a really neat, tidy record. We had Warren Buffett and Bill Gates as the special committee, advised by counsel for religious elders and ethics professors, and therefore, you know, you just get rid of it early. It's just not going to be that way. It may over time bear up. But it bears up after, you know, that wonderful thing we call discovery.

And after the discovery happens, people writing briefs and all that kind of stuff, which, again, I don't know how people keep that in the five figures. Since you all -- you are going to have those costs, too. Fee shifting is not prevalent in the U.S. I don't know what these things are worth in the current market. So take that to heart. I don't need to set a schedule at this point. You need to talk about getting discovery going.

What I would suggest would be

rational, if you're not going to get it settled, would be that you focus on getting some document discovery done first, then perhaps getting the plaintiffs to -- the multiple plaintiffs to coordinate and file an amended pleading that everybody takes a shot at.

MS. HARRISON: Your Honor, this is a difficult group of lawyers. I've had already difficult experiences with this group. If I could ask you to set some kind of a schedule, also. We need it. That's one reason I'm here.

THE COURT: What I would tell to the defendants, this is going to be sort of self-enforcing. You're going to have claims holding over your head until you get the document discovery done.

You know, it's going to be pretty simple. You know, they're going to want to get rid of the claims. Well, you're shaking your head. I'm not going to do this. Look, they're in court now. If people horse around with this Court, this Court takes care of them. I've ordered the discovery to go forward and it's going to go forward. If people are obstinate, they will -- you can file a motion.

MS. HARRISON: Thank you.

THE COURT: I think everybody understands.

I have no idea -- you said they're difficult. I don't know how difficult you've been, not to say that you're not the most gracious, wonderful person in the world. I'm just not there. Sometimes it's been my experience that -- on more than one occasion -- that difficulties arise and no one is exactly in the right.

What I'm saying is, you haven't made any kind of record of that today. You have not.

MS. HARRISON: It's in my affidavit.

THE COURT: What, that they didn't give you documents?

MS. HARRISON: It's in my affidavit that my very first phone call with Nasser Kazeminy's law firm is the man threatening me. It's a very difficult group of lawyers. I've never experienced that kind of difficulty in my life, and I've been practicing for 20 years. And I practice in New York City where you think they're tough. I have not experienced this before. And I really believe that we need --

THE COURT: Well, you're in Chancery

now. I don't know who is representing -- I can't pronounce his name at this point.

MR. EAGLE: This is David Eagle. I'm representing Nasser Kazeminy. I never met Miss Harrison until this morning. Never had a phone call or e-mail. We're in Delaware. We're in Chancery Court. Everyone is going to work cooperatively.

THE COURT: If you hear from somebody who is not admitted pro hac about this case, then bring it to the attention of the Court. What you did in -- before this case was filed -- again, I was not the Judge. I don't know if this was before in the later case, or after the dismissal or whatever. But I have found that when people have to file pro hac and get -- you know, face the music, all -- we do have Delaware lawyers here and they're regularly accountable to the Court. And they're the ones -- the people who are appearing here are the ones going to be responsible for discovery.

I also expect -- I shouldn't have to say this, but I've been astonished -- I expect that the Delaware lawyers will be meaningful in discovery and discovery is not left to clients. People visit offices, people find out where the documents are.

People don't tell clients, "Go through your hard drive and find your e-mails." That is not discovery. That was never appropriate discovery before e-mail. It's certainly not now. You never told a client, "Oh, look in your drawer. Find all the good stuff and send it to me." Yeah. Right. I mean, that is not a trustworthy way to do discovery.

I'm also assuming, if there was a special committee report, that a lot of the stuff is compiled.

MS. SCHENKER POLLECK: Your Honor, could you order a stipulated order for discovery or --

THE COURT: If you all -- the ones getting close to the line now are on the plaintiffs' side of the table. Okay? This is not take-out. I'm not taking your take-out menu. I ordered expedited discovery. The first instance you sit down, you can use the room here and you can talk to your colleagues. The way we're going to do this is documents first. I said that. I think I've been pretty clear. You get the documents from all the defendants.

What I would then suggest is a period of time for the plaintiff to put together an amended pleading. I'm not going to say whether expedited

discovery means they get the documents in ten days, 20 days or 30 days. This is a claim for money. Okay? This is what this is about. I'm also not going to have two groups of plaintiffs acting in an uncoordinated way.

MS. KRAFT: Your Honor, Denise Kraft. I intend to fully coordinate. We don't have the ability to do that yet. We will absolutely coordinate this case.

THE COURT: Right. Again, get -- think about your litigation budgets, think about early on whether, you know, it makes sense to go forward or whether you want to take a shot at resolving it early because it's going to get expensive. But that's the structure. I'm not going to sit here and tell you how many minutes.

You haven't even talked to the people on the other side.

Okay. Thank you.

(Conference adjourned at 10:35 a.m.)

CERTIFICATE

I, DIANE G. McGRELLIS, Official Court Reporter of the Chancery Court, State of Delaware, do hereby certify that the foregoing pages numbered 3 through 25 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 3rd day of November, 2009.

/s/ Diane G. McGrellis

Official Court Reporter
of the Chancery Court
State of Delaware

Certification Number: 108-PS
Expiration: Permanent

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

DEEP MARINE HOLDINGS, INC.	**§**	**CASE NO. 10-3026-H1-ADV**
	§	**HOUSTON, TEXAS**
VERSUS	**§**	**THURSDAY,**
	§	**JANUARY 21, 2010**
FLI DEEP MARINE, LLC	**§**	**3:00 P.M. TO 4:13 P.M.**

TEMPORARY RESTRAINING ORDER HEARING

BEFORE THE HONORABLE MARVIN ISGUR
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

FOR PLAINTIFF:	**SEE NEXT PAGE**
FOR DEFENDANT:	**SEE NEXT PAGE**
COURT RECORDER:	**SUZANNE GUEVARA**
COURT CLERK:	**RISHONA SMITH**

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EXHIBITS

PLAINTIFFS/DEBTORS:	**Marked**	**Offered**	**Received**
Exhibit Number 1	**10**	**16**	**17**
Exhibit Number 2	**11**	**16**	**17**
Exhibit Number 3	**11**	**16**	**17**
Exhibit Number 4	**12**	**16**	**17**
Exhibit Number 5	**12**	**16**	**17**
Exhibit Number 6	**12**	**16**	**17**
Exhibit Number 7	**13**	**16**	**17**
Exhibit Number 8	**13**	**16**	**17**
Exhibit Number 9	**13**	**16**	**17**
Exhibit Number 10	**13**	**16**	**17**
Exhibit Number 11	**14**	**16**	**17**
Exhibit Number 12	**15**	**16**	**17**
Exhibit Number 13	**15**	**16**	**17**
Exhibit Number 14	**16**	**16**	**17**
Exhibit Number 15	**15**	**16**	**17**

HOUSTON, TEXAS, THURSDAY, JANUARY 21, 2010, 3:00 P.M.

THE COURT: All right. Please be seated.

Okay. We're here on the Temporary Restraining Order hearing in the Deep Marine Holdings case. It's Adversary proceeding 10-3026. We'll take appearances in court, then we'll take appearances on the telephone.

MS. KURTZ: Good afternoon, Your Honor. Marcy Kurtz with Jason Cohen, here on behalf of the Debtor and the Plaintiffs in the adversary proceeding.

THE COURT: All right.

MR. MOAK: Good afternoon, Your Honor. Paul Moak, M-O-A-K, on behalf of the Creditor's Committee.

THE COURT: All right. Anyone else appearing here in court?

(No audible response.)

THE COURT: All right. On the telephone, we have an appearance from New York. Who would that be?

MR. PADUANO: Your Honor, it's Anthony Paduano and Jason Snyder, dialing in right now for FLI Deep Marine, LLC, Bressner Partners, Logan Langberg, Harley Langberg.

THE COURT: All right. Thank you.

MR. PADUANO: And Your Honor, I've submitted a pro hac vice application and also on the phone is -- or dialing is in Lisa Golden from the Jaspan Schlesinger firm, also in New York.

THE COURT: All right.

MR. PADUANO: At some point will enter her appearance in this case, as well.

THE COURT: Okay. I probably have both of you-all available on the phone right now.

Ms. Golden, can you hear me? Ms. Golden, are you there?

(No audible response.)

MR. PADUANO: She's supposed to dial in, Your Honor. I don't know if she's here yet or not.

THE COURT: I'm showing I've got two people from your firm both on the phone, so I assume she's somewhere.

MR. PADUANO: Thank you, Your Honor.

THE COURT: And then I have somebody from the 516 area code?

MR. PADUANO: That's her, Your Honor.

MS. GOLDEN: Good afternoon, Your Honor.

THE COURT: Thank you. Who's here from the 516?

MS. GOLDEN: Your Honor?

THE COURT: Yes.

MS. GOLDEN: Hi. The 516 number is Lisa Golden.

THE COURT: All right. Thank you.

MS. GOLDEN: And we are in the process of also preparing our pro hac vice motion.

THE COURT: All right. Let's not -- anyone who

wants to appear in a TRO hearing can appear without the necessity of the pro hac. I'm not going to get too tied up on that, but thank you for telling me.

MS. GOLDEN: Thank you, Your Honor.

And then from, I think, New Orleans, who do we have?

MR. ZIMMERMAN: Karl Zimmerman from Baldwin Haspel Burke & Mayer, representing Otto Candies, LLC, Otto Candies, III, and Candies Shipbuilders, LLC, which is a creditor in the bankruptcy proceeding.

THE COURT: Thank you.

MR. ZIMMERMAN: I also filed a pro hac vice application.

THE COURT: All right. I haven't seen any for HUX yet, so same rule for you.

In the 612 area code? Do we have anybody from 612 participating? Hold on. I didn't click it right. Let me try that from the 612?

MR. WINDLER: Your Honor?

THE COURT: Yes. Who do we have?

MR. WINDLER: Joseph Windler with the law firm of Winthrop and Weinstine in Minneapolis. I represent Nasser Kazeminy, JK Holdings, DMT Ventures, Daniel Ericson, John Hudgeons, and Eugene Diploma in the Delaware proceedings and the Kazeminy's in the bankruptcy proceeding, as well.

THE COURT: Thank you.

And finally, we have someone from Houston, 713-668 exchange?

MR. DAVIS: Hi, Your Honor. Tony Davis. My plane literally just landed. I'm here on behalf of the Kazeminy and Candies entities.

THE COURT: Thank you. All right. I've read the application and some of the exhibits. There's an opposition brief that I did not see until I just walked out and I now see it on my screen.

MS. KURTZ: Did Your Honor want to take a minute to read that?

THE COURT: Yeah. I need to. I did not realize that had been filed and I apologize.

MS. KURTZ: That's fine. No problem. Let me --

THE COURT: What time did that come in?

MR. PADUANO: Your Honor, there's also -- Anthony Paduano, Your Honor. There's also an affidavit with probably substantial exhibits that we've also put on the PACER.

THE COURT: Right. That's part of that opposition brief, right?

MR. PADUANO: There are two separate instruments, Your Honor, two separate documents.

MS. KURTZ: The brief, Your Honor, is about 16

pages and then there's a rather -- you know, about an inch stack of exhibits attached to an affidavit, which was a document filed just after the memorandum.

THE COURT: Right. I think the way it got filed -- and I just want to make sure I'm reading the right thing -- is that the affidavit got filed along with the brief as an attachment to the brief. I just want to be sure that's what you want me to read? And I'm looking -- it got filed at 2:59, so I'm not going to feel too bad that I didn't get to read it before I got out here.

MR. PADUANO: That's fine. No, Your Honor, of course not. I'm looking at Docket Number 146 that --

THE COURT: I've got document 14 is the brief.

MR. PADUANO: Correct.

THE COURT: And then it has attached to it an affidavit and then the affidavit has attached to it, 21 exhibits.

MR. PADUANO: Correct, Your Honor, yes.

THE COURT: That's it? Okay. Let me just step down and let me go read that. I'm just going to have everybody hold on the phone while I go back and read it. I'm sure this will be ten or 15 minutes and I'll come back and we'll restart the hearing. Thank you.

(Recess taken from 3:07 p.m. to 3:18 p.m.)

THE COURT: Okay. Ms. Kurtz, let's go ahead.

MS. KURTZ: Thank you, Your Honor. Mr. Moak may have just stepped to the men's room. He'll be in just any minute. I just wanted to tell the Court we're ready to go though.

THE COURT: Okay.

MS. KURTZ: Your Honor, I think that -- I've been debating here. I think I'm just going to start in chronological order how this began and bring us to the current, which will then lead into why we're here today, why we're entitled to a Temporary Restraining Order and meet the standard for that and the specific relief we're asking the Court for today, based on the pleadings that are live in the Delaware action.

If the Court has the Exhibit Book that was prepared by the Plaintiffs/Debtors in front of you, I'm going to just highlight through what those exhibits are. That will make more sense when I offer those exhibits into evidence, Your Honor.

(Plaintiffs/Debtors Exhibit Number 1 marked for identification.)

MS. KURTZ: If you'll look at Exhibit Number 1, the actions between the Delaware Defendants -- I'm sorry, the Delaware Plaintiffs, who are the Defendants in the adversary proceeding, started when they filed a Verified Complaint, which we have as Exhibit Number 1, alleging what

they claim on their own, if you look at page 1 to be a shareholder's derivative action claims brought against the Debtors and certain of the other individual Defendants that have been named in the Delaware action.

(Plaintiffs/Debtors Exhibit Number 2 marked for identification.)

MS. KURTZ: And that matter, Your Honor, if you'll notice Exhibit Number 2, was dismissed by the court -- by the Chancery Court of Delaware for a failure to follow certain of the rules or to state it even more objectively. Apparently there was a demand by the Plaintiffs in that case for certain information. The Defendants had not had a sufficient time to respond to that demand for information. The Chancery Court said, "I'm going to dismiss this action and give them a chance to respond."

(Plaintiffs/Debtors Exhibit Number 3 marked for identification.)

MS. KURTZ: Shortly after doing that, Your Honor, if you'll look at Exhibit Number 3? Plaintiff's First Amended Petition was filed in the State District Court in Harris County, Texas. It is virtually identical to Exhibit Number 1 and it was filed two months after the dismissal of Exhibit Number 1 and after the entry of the Order, Exhibit Number 2. These claims are also in derivative in nature. They say so themselves on page 3 and otherwise in that

Complaint. They are very similar, if not verbatim, in many cases to the allegations that are found in Exhibit Number 1.

(Plaintiffs/Debtors Exhibit Number 4 marked for identification.)

MS. KURTZ: There was an Amended Motion to Dismiss and an Order granting that dismissal, which we've marked as "Exhibit Number 4," where the Defendants in the State Court action in Texas, which were the same as the Defendants in the Delaware -- the first Delaware action, where they sought and obtained a dismissal of the Texas suit because the claims were derivative in nature and that the Plaintiff lacked standing to bring them.

(Plaintiffs/Debtors Exhibit Numbers 5 and 6 marked for identification.)

MS. KURTZ: Exhibit Number 5 is the live Complaint. Exhibit Number 6 is what we've called a "copycat" or a "Me, Too, Complaint," filed by an additional Plaintiff, the same Defendants. And that -- those are the two actions, Your Honor, 5 and 6, that we're here on today where the Debtors are asking the Court to enter a Temporary Restraining Order until such time as you can determine whether the claims that have been pled in Exhibits Numbers 5 and 6 are property of the estate or otherwise stayed as being direct actions against the Debtor.

(Plaintiffs/Debtors Exhibit Number 7 marked for

identification.)

MS. KURTZ: Exhibit Number 7, Your Honor, is the Suggestion of Bankruptcy. As you know, this bankruptcy case was filed on December 4th, here in this Court, and a Suggestion of that Bankruptcy was filed with the Chancery Court in Delaware advising all of the parties and the Court that the action should be stayed.

(Plaintiffs/Debtors Exhibits Numbers 8 and 9 marked for identification.)

MS. KURTZ: Exhibits Numbers 8 and 9, Your Honor, are the current as of the submission of the Exhibit Notebook. Case histories are what we call “Docket Sheets” for the live actions that Complainant Number -- Exhibit Number 5 and similarly, the one that’s at Exhibit Number 6. Those are Plaintiffs’ Exhibits Numbers 8 and 9.

(Plaintiffs/Debtors Exhibit Number 10 marked for identification.)

MS. KURTZ: In response to the Suggestion of Bankruptcy, there wasn’t a pleading filed, but instead, the Plaintiffs in the Delaware action prepared a letter to the Court to the Vice Chancellor, dated December 8th, that’s been attached as “Exhibit Number 10,” advising the Court that they intended to pursue their claims against the non-debtors.

(Plaintiffs/Debtors Exhibit Number 11 marked for

identification.)

MS. KURTZ: In response to that letter, the Debtor's Counsel in the Delaware action, Mr. K.B. Battaglini of the Greenberg Traurig Law Firm, who is -- has a motion pending in this Court for retention of special counsel to continue that -- it's necessary to continue that representation -- filed a response to the December 8th letter, which you'll find at Exhibit Number 11, advising the Delaware Court, not only of the automatic stay against the Debtors, but also as to the parties related to the Debtors where the claims were aggregated and also advising that Court and all of the parties that the claims were derivative in nature.

As -- if you'll go back, Your Honor, I'll do this in the argument now, but if you'll go back and review Exhibits Number 8 and 9, notwithstanding the Suggestion of Bankruptcy filed December 4th and the letter December 11th indicating that the Debtors' view was that the claims alleged in the Delaware action were derivative in nature, the Plaintiffs continued to prosecuted their claims, not again the Defendants, but against all of the non-debtor Defendants, notwithstanding the Debtors' position and statement to the Court that they belong to the Debtor and that the Plaintiffs should not proceed.

(Plaintiffs/Debtors Exhibit Number 12 marked for

identification.)

MS. KURTZ: The -- as a result of that, Your Honor, I sent a letter, which is Exhibit Number 13, to all of the Counsel in the Delaware action -- I'm sorry, Exhibit Number 12. I sent a letter to all of the Delaware Counsel advising them not to proceed and if they did, that we would come to this Court and seek injunctive relief, that we prefer not to do that, that it was the Debtors' position, as stated by Mr. Battaglini already, that the claims that they pled were derivative in nature and belonged to the estate and should be pursued by the estate, or a designee of the estate.

(Plaintiffs/Debtors Exhibit Number 13 marked for identification.)

MS. KURTZ: The response to that was Exhibit Number 13, where they said essentially they intended to continue to prosecute those claims and causes of action.

(Plaintiffs/Debtors Exhibit Number 15 marked for identification.)

MS. KURTZ: If you'll skip to Exhibit Number 15, which was added in an Amended Exhibit List, Your Honor, today the Plaintiffs' Counsel wrote another letter to Vice Chancellor Strine, reiterating that they intended to go forward with their claims against the non-debtor Defendants and arguing that the stay did not apply.

(Plaintiffs/Debtors Exhibit Number 14 marked for identification.)

MS. KURTZ: Exhibit Number 14, Your Honor, is just various emails indicating that notice of today's hearing was appropriate under the circumstances for a Temporary Restraining Order.

THE COURT: All right.

MS. KURTZ: I'd move for submission of Exhibits 1 through 15, Your Honor.

(Plaintiffs/Debtors Exhibits Numbers 1 through 15 offered into evidence.)

THE COURT: All right.

MS. KURTZ: They've been sent to all of the parties. To my knowledge, on the phone, they were sent to them along with the Exhibit List. They were sent to them by PDF yesterday.

THE COURT: All right. Let me hear from Mr. Paduano to start with.

MR. PADUANO: Your Honor, the documents are all to our eyes authentic. I don't have any objection as to that. We're a little bit handicapped, given the shortness of notice we've had for the hearing to make -- complete so we'd ask the Court at some point for leave to make a supplemental -- to accept the documents introduced for completeness, but as to these exhibits, we don't have objection.

THE COURT: Thank you. We're going to admit them solely for the purpose of the TRO Hearing, not for the purpose of any other hearing, so that if you do need to offer something for completeness, whether we issue the TRO or not, we're obviously going to get to some preliminary injunction hearing, and at that point, all your objections will be preserved and you can offer them at that point, if you need to.

(Plaintiffs/Debtors Exhibits Numbers 1 through 15 received in evidence.)

MR. PADUANO: Thank you.

THE COURT: Thank you.

MS. KURTZ: Thank you. Your Honor, we're here today for Temporary Restraining Order Hearing. We're not asking the Court to decide on the merits today, you know, on two days' notice without adequate time for the Adversary Defendants to respond, to determine unequivocally that the claims -- although we think you could, we're not asking you to do that, that they are unequivocally derivative claims. It is the Debtors' belief based on admissions by the Delaware Plaintiffs themselves, by comments from the Delaware Court, and by following the case law, that the claims are very likely derivative in nature and belong to the estate.

And if the Plaintiffs in the Delaware action

are allowed to proceed on those actions, which they've indicated as late as today, that they intend to do, absent an Order from this Court, that there will be irreparable harm and injury to the Debtor.

And the reason for that would be this is not something where you can say -- proceed and if I'm wrong, we can sue you and we can get a monetary damage. We're talking about litigation proceeding, so to the extent those claims are owned by someone, and we are not able to prosecute them, that would be an irreparable injury. That is, in essence, someone taking over control and direction of an asset of the Debtors' estate where we would have no control over how those proceeded.

The other -- if there's -- Exhibits Numbers 8 and 9, I think, Your Honor, if you go through those, contain adequate evidence for the Court to show that there is an emergency at hand here. There is discovery outstanding. There are answers that are due by these non-debtor Defendants. The Court -- I think it's called the "Court of Chancery" in Delaware and the Vice Chancellor there has already entered a ruling that the discovery should proceed at an expedited basis.

So if this Court does not enter a restraining order, I think that that lawsuit in Delaware will just proceed far enough down the path that when this Court makes

a determination that the claims in the underlying action are property of the estate, we won't be able to "unring the bell."

The standard, Your Honor, is irreparable injury, whether there's an adequate remedy at law, likelihood that we would prevail on the merits, once there is a trial, a balance of hardships and the effect on public interest.

It's clear that the Plaintiffs intend to proceed absent an Order of the Court. The injury, Your Honor, I've indicated is irreparable in that it can't be remedied by monetary recompense. There's no way to say, "We'll pay you back later, if you just let us proceed today."

The Delaware Plaintiffs have argued in their response that they should be allowed to proceed and if at some point in the future you decide the claims are derivative, well they will have been prosecuting those on behalf of everybody. But I think if those claims belong to the estate, the estate can do with them as they please. They could be turned over to the Committee, which, in fact, has already been discussed to the Committee Counsel to investigate and prosecute those claims, as may be appropriate. They could be compromised, settled. They could be negotiated in some way as part of a plan. There

are a lot of different things, strategy or otherwise, that could take place if the Debtors themselves were able to manage their own assets.

The no adequate remedy at law, Your Honor, is very similar to the irreparable injury. Sometimes those two are combined when the Court analyzes whether the standard has been met. Here again, no monetary reward would do, no "unringing of the bell."

The substantial likelihood of success on the merits is the most important element. I'd like to reserve that for last so I could go through the actual causes of action, Your Honor.

The balance of the hardships: The only injury to the Delaware Plaintiffs, Your Honor, would be a delay of time. The injury to the Debtors is an irreparable loss of their legal right to pursue their claim. It would be like giving a hard asset away to someone and saying, "Sell it," and we could always take the money later, but they may not -- they may not know the market.

They may not sell it for the right price. They may not -- we don't know what they would do with it. And so here, particularly because we're not talking about a hard asset, but a legal right, we have no idea what the strategy would be, or how that litigation would proceed, or whether there would be benefit to other creditors that might

be reaped, if, for example, the Unsecured Creditors Committee Counsel were to pursue those claims for the benefit of all of the creditors of the estate.

The truth is, there's probably no harm to the public interest. This is always a difficult element to meet with respect to a TRO, I think, in a Bankruptcy Court, but I think it is always in the public's interest to maintain the status quo until the Court of proper jurisdiction can determine whether there's a right that should be preserved here, and that's what we're trying to do.

With respect to substantial likelihood of success on the merits, Your Honor, you have to -- this Court has already written an opinion, which is squarely on point with our facts here. I don't know that we could have a set of facts any more exact to the facts in the Court's case, *Dexterity Surgical*, at 365 Bankruptcy 690. In that case, the Court looked to the standard set forth in *Tooley versus Donaldson*. It's *Tooley versus Donaldson Lufkin* -- and I can never pronounce the last name, at 845 A2d 1031, Delaware, 2004.

The Fifth Circuit has instructed the Courts in the Southern District to look to state law to determine if claims are direct or derivative and this Court has held in *Dexterity* that actions involving the internal affairs of the "corporation" are governed by the law of the state of

incorporation. Here the claims brought by the Delaware Plaintiffs focus on Deep Marine Holdings, Inc., which is a Delaware corporation.

From this point, Your Honor, the facts of the underlying lawsuit in Delaware are almost exactly like the facts in *Dexterity*. What the Court found in *Dexterity* and following the *Tooley* standard, is that the proper analysis to distinguish between direct and derivative actions should be based on who actually suffered the harm, the corporation or the person bringing the claim and who would receive the benefit if the harm was undone. In other words, once there is a remedy and a recovery, who is going to get that? The individual shareholders or the Debtor themselves?

And seven, analyzing the first prong, it's helpful to ask -- in other words, when -- not just who the name is on the pleading. You know, "I've sued in my own name and I say that I've been injured," but instead, it's helpful to ask, "Has the Plaintiff demonstrated that they can prevail without showing that there was an injury to the corporation?"

And if you go through the specific causes of action in the underlying Delaware case, you can see that they are either directly against the Debtor and/or stayed and we don't really need a TRO, there's been no indication by the Plaintiffs in the Delaware action that they intend to

proceed against the Debtor, for example, on the appraisal rights claims. So while the first cause of action is for appraisal rights against DMT, we don't need a TRO for that. That would be automatically stayed.

The second cause of action, Your Honor, and similarly, causes of action two through six, the first -- the cause of action two is a claim against the officers and directors for breaches of their fiduciary duty. And then three, four, five and six are -- I was going to say "clever," but I don't mean to be pejorative -- sort of interesting variations of breaches of fiduciary duty.

The third cause of action is a claim against the controlling shareholder Defendants for their breaches of fiduciary duty.

The fourth is a claim against the controlling shareholder Defendants for unjust enrichment, which they got as a result of that breach of fiduciary duty.

The fifth one is the claim against the controlling shareholder Defendants for aiding and abetting a breach of fiduciary duty.

And the sixth one is a claim against the officers and directors for aiding and abetting a breach of fiduciary duty.

So they're all really a breach of fiduciary duty claim. And so they allege in their Complaint, Your

Honor, in all of them this -- the ones that are live and in all of the preceding ones that were dismissed where they clearly represented in their pleadings themselves that they were holding derivative claims, that the officers and directors and the other individuals that have been sued, were aiding and approving DMT actions for the private purposes of the controlling shareholders, that would be the Otto Candies entities and also the Kazeminy entities.

These actions allegedly include gross misuse of corporate funds, self dealing, corporate looting, failure to follow corporate formalities, gross mismanagement. They have alleged very specific things, like money going out of the company to some Senator's wife. They've alleged that there were improper dealings on commercial transactions between the insiders and the company that have caused the company to take on additional debt, which then enabled that particular shareholder to flip that debt to more equity than he was entitled to.

But all of those causes of action, you have to prove that there was some damage to the company, and if there was a remedy, if there has been money transferred improperly -- for example, from the company to the Senator's wife -- that would be a fraudulent transfer and the money for that would not go back to the shareholders, who may have been harmed from that, it would go back to the company

because everybody -- all of the creditors and parties-in-interest of the Debtor would be harmed by that and would be entitled to reap the benefit of that money coming back into the Debtor.

And so, the Plaintiffs, while they may have been injured, they have been no differently injured than people similarly situated on whose behalf they should be bringing the claims and the remedy would benefit everyone. It would -- the money would come back to the Debtor and the proceeds -- the remedy for that would benefit all of the Creditors and parties-in-interest of the Debtor.

Your Honor, the seventh -- I just was going to reiterate that argument. I think I can go through it with each of the other claims, but I think two, three, six are identical, Your Honor. They are just some version of the breach of fiduciary duty.

The seventh cause of action, Your Honor, is a claim against the Defendants in the Delaware action for fraud through active concealment of material facts. And you know, I was -- you know, honestly I would say this claim is a little harder to call, but where I think the other ones are absolutely and unequivocally derivative actions for the benefit of the estate, I would say that the seventh cause of action is probably both, something that would be a derivative action for the benefit of all of the creditors

and something where the minority shareholders could argue that the failure to disclose certain information was directly harmful to them, so there would be an overlap there.

But again today, Your Honor, I don't know that we have to make a concrete decision. We have to show that there is a high likelihood that we would appeal on the merits when there is an actual trial and the fact even that this cause of action could be either one and the same with the eighth one, Your Honor. Maybe the eighth one -- or the seventh one less so than the eighth one -- where there is -- where there could be both. I mean, I don't know that it would -- I don't think that there is a single claim in here that belongs just to the Defendants, but I think that seven and eight may arguably belong to both.

But clearly you could show on the fraud through active concealment of material facts, that it is the Debtor that would reap the benefit, if there was a remedy. The -- I think the argument is that the officers and directors falsified corporate documents to cover up improper payments to third parties. I think this was the cause of action where they alleged that there were payments to Otto Candies that shouldn't have been made and that that enabled the company to increase the -- carry a higher debt in favor of Otto Candies, which he was then able to flip for a higher

percentage interest.

So again, they may have been harmed by that. There may be a duplication where there is a derivative action and a direct action, but there is also a derivative action at stake.

The eighth cause of action fraud through silence in the face of a duty to disclosure is very similar, both in terms of the facts that are pled, and the cause of action itself for fraud through active concealment -- I'm not sure what the difference is between active concealment and failure to disclose through silence. I mean, to me, the allegation is that there is a fraud, that they had information they should have disclosed. Bad things were happening. The company was looted. There was financial hardship and damage to the company, which should be rectified for the benefit for all of the Creditors and parties-in-interest.

The ninth cause of action claimed for -- claimed against the controller shareholder Defendants for wrongful equity dilution: This is phrased as if it were the shareholders who were hurt by the dilution of the Debtors' equity. You know, the Court has been clear in the *Dexterity* case and as guided by the Fifth Circuit not to look at how the claims are actually pled or how they're titled, you know, what they called them, but, in fact, to look at the

substance of the claim itself. And the claim for dilution rests on the premise that the Debtors overpaid for assets sold and leased to them by Otto Candies, the same stories again, and then converted that to inflated debt equity and diluting the outstanding shares.

So they have pled it as if they were harmed individually, but they weren't. And it's the company that was harmed by those actions and that would make that a derivative claim.

The tenth cause of action is for an accounting and while that is a direct cause of action, it is a claim against the Debtor and would be stayed by the automatic stay without need of a Temporary Restraining Order from this Court.

So Your Honor, it's a very long way of saying that this Court has exclusive jurisdiction to determine what is property of the estate by arguing -- by focusing the Vice Chancellor Strine in the Delaware Chancery Court on whether the stay applies to Debtors versus non-debtors, it skips a really important issue. I think in general -- and at first glance, if this were a different kind of lawsuit, if it were not one that contained derivative actions, that would be a very strong and compelling argument to the Court in Delaware that: Why are these non-debtors reaping the benefit of an automatic stay?

And the parties there might be left with just the argument about the aggregation of claims, that there is indemnity provisions that sort of -- what we call in Texas, "inextricably intertwined," which they don't use in Delaware, but that kind of argument. In this case, though, I think the more compelling argument is that the claims belong to the estate. So it's not that the actions are stayed against non-debtors. It's that they very likely should proceed, but they should proceed through this Court, either by the Debtor or a designee of the Debtor.

And I think that's important. I understand the Delaware Plaintiffs' argument, which they pled in sort of a notice way, their response, which I also understand on short notice, that you know: Why would we want the Debtors to pursue this claim? I mean, you know, they are the targets here, but the law says that those claims belong to the Debtor and now really the Debtor is a new entity. Courts recognize that Debtors are really a new and different entity than the entity that existed on December 3rd and the difference we have here is that I have a Creditor's Committee who is very interested in these same claims, to investigate them, to determine if there has been wrongdoing by the officers and directors.

So while those claims belong to the estate, I would anticipate from a lot of angles, that there would be

constituencies already active in this case, who may not want the Debtor to have sole control or any control over those claims and causes of action.

THE COURT: Didn't we displace management?

MS. KURTZ: Yes. We've got a Chief Restructuring Officer. That's why I was going to say, so --

THE COURT: So forgetting the Committee for a minute, we don't have --

MS. KURTZ: Correct.

THE COURT: -- the same management people?

MS. KURTZ: We do not.

THE COURT: Okay.

MS. KURTZ: We do not, although to be clear and you know, Your Honor, the former President and the former Chief Financial Officer are still assisting the Chief Restructuring Officer, in different capacities. They both are extensively helping with marketing efforts, either for the sale of the vessels or for investors to invest in the company for reorganization.

I'm not prepared to say today what the long-term likelihood is of employment for those --

THE COURT: But official control is vested, as I recall by our Order, exclusively in the CRO.

MS. KURTZ: And he is exercising that exclusively.

THE COURT: Okay.

MS. KURTZ: So he would either keep those, or if there was substantial push back and/or an order from this Court, we have had preliminary discussions with the Unsecured Creditor's Committee, you know, so that they could do conflicts checks, if we -- if we needed to punt that particular litigation or investigation, would they be prepared to take that?

So we believe strongly that the claims belong to the estate for the benefit of all of the creditors and parties-in-interest. We understand that there could be an argument that the Debtor may not be the perfect person to pursue those.

Our argument back would be: We have a Chief Restructuring Officer. We have independent management today. If you're still not satisfied, we have an Unsecured Creditor's Committee. Those make the facts very different than they were on December 3rd and prior in time.

THE COURT: All right. Mr. Paduano, what kind of response do you have?

MR. PADUANO: Your Honor, thank you very much. I want to make it very clear that what's pending in the Delaware Court is not a derivative action. They're direct claims against the Defendants there. And the Counsel has correctly stated that we have disclaimed any interest in anyway of pursuing anything in light of the bankruptcy stay,

any claims against Deep Marine Holdings, Inc. or Deep Marine Technology.

So Your Honor, then to the extent the argument and the application for this Court is based on the analogous of how we've got derivative claims, it's just not the case. Moreover, the reliance the Court has just heard about Your Honor's decision in *Dexterity* and the Delaware case that underlies that concern shareholders. We are not shareholders of the Debtors. Our shares have been canceled, in a word, and the Court can look at Exhibit "O" to my affidavit. It shows the merger of what our interest to another entity and don't have an interest right now, the way the law works in Delaware, in either of the Debtors.

And clearly, Your Honor's decision in *Dexterity* and the Delaware *Tooley* case be to shareholders and then was trying to evade the automatic bankruptcy stay. We're not shareholders. They and another machination, which I'll get to in a second, cancelled our shares by doing a short form Delaware merger.

And Your Honor, that gets to the point of what's going on here. What's going on here, as Counsel says, they asked the Delaware Court to stay our action. They filed the Suggestion of Bankruptcy. That is attached to Exhibit F of my Affidavit, giving notice once the Delaware Court was going to allow the case to proceed,

actually on an expedited basis, that these entities that have been merged literally out of business, were going to file for bankruptcy and the Delaware Court, as Counsel correctly stated, set an expedited schedule for discovery.

And the reason for that is that these Defendants here, specifically Mr. Candies and Mr. Kazeminy, the Candies' entities, Mr. Candies and Mr. Kazeminy, we think seriously made misrepresentations to the Delaware Court. This dispute started in the fall of 2008 when on a confidential basis, a source came to our clients. It's a very small corporation with very few shareholders, that there was wrongdoing. Our client, under Delaware law, made a demand as they must to the corporation asking that the corporation investigate the wrongdoing and see if there was merit to it, and we made that demand.

For more than five months, nothing happened with that demand. In the interim, we sued. We did, in fact, file a derivative action in Delaware. And the Defendants met that that action with a Motion to Dismiss, saying that our client was not ripe, that dismissal was because the Special Committee Minister Battaglini was counsel to -- Greenberg Traurig was Counsel to -- said it hadn't had enough time after three months to complete its work. So the Delaware Court dismissed without prejudice and allow the Special Committee to complete its work.

The Special Committee completed its work on June 30th, 2009. The next day -- there's a typo in my affidavit, Your Honor. I apologize for that. The next day on July 1st, 2009, our shares were cancelled -- our clients' shares were effectively cancelled and there was a short-form Delaware merger, which the Kazeminy entities and the Candies entities were entitled to do because of their vast majority holdings in this closed corporation.

Thereafter, Your Honor, we filed the current action that the Defendants seek to have, in effect, stayed because they believe in some form that it runs afoul of the stay, and our claims don't. This was, as they say, the Court when it takes the time to go through our papers, there are a few shareholders. We identified wrongdoing. The company had been valued as we pled in Delaware at more than 100 million dollars -- derivative transaction for more than 100 million dollars. On July 1st, 2009, the company's value was nothing. There's a valuation that's attached in the papers here. I'm sure the Court noticed a merge in Exhibit O that shows their shares were worth a dollar.

And Your Honor, we've got serious claims against these non-officers, non-directors of the bankruptcy entities for what they've done to our shares. They had duties to us. They have fiduciary duties to us as majority shareholders, as organizers of the investment, a host of

duties and frankly, the reason that they wrote to your Court seeking a TRO is because the Vice Chancellor Shrine is, I think, going to hold her feet to the fire and say that that entities that are not encompassed by the Bankruptcy Court stay are entitled to that protection, and that includes Mr. Candies, Jr., Mr. Candies, III, Mr. Kazeminy, DCC Ventures and JK Holdings Corporation and KOC, Otto Candies, LLC and obviously there's issues with the former directors, who might have greater claim to the protection of this Court, but I don't think that the organizers of the investment. Outside investors, who were neither directors, nor officers, who were employees of the bankrupt entities, I don't think they get to enjoy the stay at all.

So we do have these direct claims because they have done things that have destroyed our values. Counsel has conceded that the ultimate chance we take of the success on the merits by the Debtors here is nil. She just said that some of these claims may be joint, even if their analysis somehow they've got a derivative action in Delaware, even though it's not apprised, at some point we get to pursue those claims against these people who have wronged us and I don't see how a stay can be issued when we've got a concession that claims may be pursued at all.

As to the argument somehow that there's irreparable injury here, these entities, as far as we know

in Delaware, we've been deprived of lawsuit, has no idea what has happened to them at all, except for the valuation that showed them at no values as of July 1st, 2009. I don't know how they could possibly be injured by re-pursuing claims against non-officers, directors and employees, agents, in another forum at all.

And this concept, somehow that the claims that we have regarding our shares and what was our seven million dollars that we were entitled to, the value of our shares before this deceit started, somehow belongs to the corporation or to other creditors, I don't see that at all. I don't see how they could possibly apply because again, our claims don't run against the corporation. Now in light of the stay, we can't pursue, but clearly against the actions that Mr. Kazeminy took and Mr. Otto, the entities and others that they took, we clearly get to pursue those.

They ran the companies as their Candy Store and we got close to them and came very close to firming things up in Delaware. They cancelled out shares -- a very aggressive act. It clearly got the attention of the Delaware Court, which is why we're on the phone today because I don't know how they're going to explain that result to the Delaware Court. So the concept somehow that these claims should be -- our claims in Delaware should be stayed and surrendered to Counsel that's being retained by

these two entities that were worth a dollar as of July 1st, 2009 because of being pursued by Counsel, that is nominated by the Debtors to pursue them as to others where they're speculating that at some point their bills are being paid by Mr. Kazeminy and Mr. Candies, who orchestrated these entities and do stuff to invest in the entities and have done everything to frustrate our interest into that. The concept of this claim is being pursued diligently, fairly -- analyzed diligently and fairly at all, so we cannot -- I don't see how Counsel can possibly overcome that conflict in any way.

So even if there were Proof of Claims ultimately it wouldn't be the estate controlled by these same entities that would be pursuing those claims. So, Your Honor, this is not a situation where the *Dexterity* decision applies. It's not something where you've got parties, us, in front of you who are trying to end around the stay at all. I think they've been chewed by half by cancelling our shares. They began arguing that we were shareholders trying to get around your stay, but we're not. We're former shareholders. They kicked us out. We don't have a claim, according to them if they're to be believed as to the equity or debt or assets or anything of Deep Marine Holdings and Deep Marine Technology and the four special purpose entities that we're unfamiliar with, that are part of the action in

your Court. They kicked us out.

So we'd like to sue them, but you know, the stay is there, but at the end of the day, if they're right, they've short-form merged us out of our equity positions. You know, we don't have a claim there. We have an appraisal proceeding in Delaware that's already been commenced, that's starting, that under Delaware law is supposed to go forward to assign a value, their value, to our shares we would clearly then say because that involved the Debtors of Your Honor's Court.

So Your Honor I don't think there's a record in front of you to take the extraordinary action of truly taking away the jurisdiction of the Court in Delaware that's got these claims in front of it that is dispute has been kicking around in various forms and so for well over a year and we have the Court in Delaware to help us. We got in the Court in Delaware to expedite things because the assets have been taken away from us and now we must pursue these individuals.

Our task is quite difficult and we take this as just another effort to make it that much more difficult and much more expensive for our clients. So we'd ask the Court to deny the TRO Application in its entirety to the extent that if the Debtors want to go forward after some discovery to see what actually is going on and where the

right to remedies actually lie after discovery, we could appear back before the Court for a preliminary injunction, I would ask that the most that this Court does is strike at this time.

Thank you.

THE COURT: All right. Thank you.

All right. I'm granting the Temporary Restraining Order and let me give the reasons why I'm going to grant the Temporary Restraining Order: Actually, I oftentimes deny Temporary Restraining Orders because I think that we need to be extraordinarily careful in issuing one, but having reviewed really the four corners of the Complaint to determine what the story is, I think that the Plaintiffs' view of what the Complaint says -- not maybe what it could say, not maybe what somebody wants it to say, but what it says unambiguously largely states claims that are property of the estate.

I am guided today by Fifth Circuit law that says that if something is arguably property of the estate, that it is a violation of the automatic stay to exercise any control over it or to take any action against it and I refer the parties to the *Chestnut* case at 422 F.3d 298.

We have jurisdiction over this matter under 20 U.S.C. Section 1334. It is a core matter under 20 U.S.C. Section 157 in determining whether to grant a Temporary

Restraining Order, I will follow Fifth Circuit law under *Speaks versus Cruz*, at 445 F.3d 396, a 2006 Fifth Circuit case, the standard for standard, substantial likelihood of success on the merits, a substantial threat of irreparable harm if the injunction is not granted, that the threatened injury to the Movant outweighs any harm to the Non-Movant that may result from the injunction and that the injunction will not undermine the public interest.

First, is there a substantial likelihood of success on the merits? My answer is that I think there's a pretty overwhelming likelihood of success on the merits as the Complaint is now pled. Now I think that Mr. Paduano makes persuasive arguments that there may be a complaint that they can file that would not violate the automatic stay and when an amended complaint gets presented to me, if it gets presented before the expiration of the TRO or if it gets presented at the Preliminary Injunction Hearing, this ruling may change and it may change very dramatically for those of you that are interested in the outcome.

I'm ruling on this Complaint, not really on the Complaint described by Defendant's Counsel. Let me just go through -- and I'm not going to go through every paragraph of the Complaint right now, but I'm going to go through some of the Complaint and just say why I think this is a fairly obvious decision. The Complaint starts off by

saying, “This action is filed by the victims of a conspiracy to loot Deep Marine Holdings and its subsidiaries, including its wholly owned subsidiary, Deep Marine Technology.” It’s a corporate looting case. That is what is pled.

When I do to the causes of action, I think everybody agrees that the cause of action for appraisal rights is stayed. The second cause of action is a claim for general breach of fiduciary duties, without really describing what those breaches are, but referencing back to paragraphs 1 through 148, that largely describe the looting, the self-dealing, the misuse of corporate funds, and describe them in way that, you know, frankly are very persuasive and offensive if true. I’m obviously not deciding what’s true, but there is a major corporate looting case is pled here.

When I look at the third cause of action, it gets more specific than the second. Paragraph 157, however, goes and says, “Otto Candies sold vessels and equipment, some of which were not seaworthy and required hundreds of thousands of dollars to repair to DMT at inflated prices while Otto Candies was a controlling shareholder of DMT and while Otto Candies, III, was a member of DMT’s Board of Directors. By reason of the actions described above, Otto Candies and Otto Candies, III, breached their fiduciary duties to DMT by engaging in a classic case of self-dealing

thereby looting DMT and its subsidiaries, unfairly diluting minority shareholder Plaintiffs and diminishing the value of Plaintiffs' DMT stock."

This cause of action has nothing to do with the theft of the shares. It has to do with looting of the corporation. The unjust enrichment is the same kind of Complaint.

The fifth cause of action, again we don't get the specifics. We're incorporate prior paragraphs, but by incorporating them in each of these situations as the basis for the cause of action, what the Plaintiffs rely on is injury to the corporation for the measure of the damages to the Plaintiffs and when they rely on injury to the corporation as the measure of the damages to the Plaintiffs, they are stating a cause of action that in my mind -- at least arguably under *Chestnut* and I think probably more than arguably, belong to the estate to bring.

The seventh and eighth causes of action are sufficiently ambiguous that I don't know what they are. Again, they incorporate the prior paragraphs. By incorporating the prior paragraphs, they arguably are property of the estate and that is the standard I am required to follow under *Chestnut*.

The wrongful equity dilution, I agree almost precisely with the way that Ms. Kurtz described it, which

although it is described as a shareholder dilution, what it says is that the shareholders were diluted because assets of the corporation were diverted out and by doing that, it diluted the value of the shares by diversion of corporation assets.

And finally, of course, the accounting is the direct claim against the Debtors.

I find that as pled, every claim is either actually or arguably a claim that is owned by the estate or is a claim against the Debtors. I therefore find there is a substantial likelihood of success on the merits.

With respect to a substantial threat of irreparable harm if the injunction is not granted, I find there is irreparable harm for two primary reasons. The first is: The law holds that a violation of the stay is by definition irreparable injury. So if they are violating the stay by exercising control in violation of Section 362(c) -- excuse me, 362(a), that is, in fact, a violation of the stay and it satisfies a substantial threat of irreparable harm.

Second, I think there is irreparable harm if the injunction is not granted because in all likelihood, prosecution of the cases is a void act, and if we get to a prosecution and a result and it’s void, that result is going to create such a mess, I don’t think we’ll ever be able to put Humpty Dumpty back together again. It just makes no

sense to allow it to proceed until what is pled is what they have a right to proceed on.

Three, that the threatened injury to the Movant outweighs any harm to the Non-Movant that may result from the injunction. I think absolutely that is the case from what I have seen. The Debtor owns these claims, at least some of them without question. All of them the Debtor arguably owns or the Debtor is a Defendant in. It is unreasonable to believe that somebody else should be able to control that without injuring the Debtor and moreover, the probability that these actions would then ultimately be determined to be void makes the problem even worse.

I frankly don't see any harm to the Non-Movants under this situation. They want to proceed with litigation, but they have not argued or shown me any harm to them in delay other than that they want to move ahead, and I understand wanting to move ahead and we're going to set things relatively promptly here, but wanting to move ahead does not constitute injury. There just isn't any injury that at least has been argued to me of holding up, taking a breath, and seeing what's going on in this situation.

Moreover, an awful lot of what is argued as the injury has to do with the fact that "The crooks are in charge of suing the crooks," is the way that I'm going to put it. I don't think that's what's going on in this case.

One of the very first things that we did was we ordered that the people that are being complained about were divested of control over the case.

I know that the folks on the phone don't know me, but I probably have a reputation down here for turning down Motions to Compromise Controversies more than any other judge in this state does. I do turn those down unfortunately for people fairly regularly and the probability of me rubber stamping a compromise that is going to allow these folks to walk away in the light of -- if I get a good objection to it, it's fairly low. I mean, I take my 9019 responsibilities with a great deal of seriousness and perhaps more seriously than some people would like for me to do, but I think there probably shouldn't be a whole lot of worry, that I'm going to end up rubber stamping a 9019 motion.

And I would also tell the folks, you need to come oppose it. It's not that I'm just going to go out on my own, but opposed 9019 motions here get treated with a great deal of serious evaluation.

Finally, with respect to public interest, I think the Fifth Circuit standard is that the injunction will not undermine the public interest. I don't think this one does, so I'm going to issue the Temporary Restraining Order. It obviously doesn't last very long. This is the first TRO

that I've issued since the new rules. I don't know if it's a 14-day standard or a 10, but I'm going to look it up.

Let me see. Fourteen days under Rule 7065 as applying Rule 65(b)(2), so we need to have a hearing within the next two weeks.

Mr. Paduano, I'd rather set this at your convenience, since you're going to be traveling. Can you tell me a convenient time for you during the week of February the 1st and I'll try and get you a hearing on a day that's convenient to you?

MR. PADUANO: It's the -- sorry, Your Honor. I'm just looking.

THE COURT: And obviously, you're welcome to participate by phone, but I suspect you're going to want to be here.

MR. PADUANO: Yes. I will be. One second, Your Honor, please?

(Pause)

MR. PADUANO: Your Honor, I take it the Court still has discretion to move things out a little bit. Would February the 8th work, the Monday?

THE COURT: I can go to the 8th, if you want to consent to the entry of the TRO, but I can't if you won't.

MR. PADUANO: We will consent to it.

THE COURT: Okay.

MR. PADUANO: We will consent then up to the date.

THE COURT: Right. Well, you're going to consent that I'm going to issue an TRO for longer than the 14 days, is what you're going to consent to?

MR. PADUANO: Yeah, I understand the Court's ruling is we do consent to the additional period of time, yes.

THE COURT: Okay. I actually have time on the 8th. I think a trial must have cancelled. I'm not sure why. I've got -- let me just open a couple of docket settings I've got and see how time consuming they're going to be. What I proposed to do is to limit each side for maybe an hour and a half for their preliminary injunction presentation, maybe two hours, and see if that works for everybody? Does that work for both sides?

MR. PADUANO: Yes, Your Honor.

MS. KURTZ: Did -- I'm sorry, Your Honor, did you give us a time on the 8th? I've --

THE COURT: Well, I'm going to look at that. I'm trying to figure out, can you live with an hour and a half to two hours for your presentation?

MS. KURTZ: Okay. I'm sure. I mean, two hours would probably be better, but I usually go under. That's fine.

THE COURT: I can give you two hours. How do you

look on the 8th?

MS. KURTZ: And Your Honor, I've got a motion -- I know it sounds small, but I've got a Motion for Relief from Stay hearing set -- let me see if that's the 8th or the 9th. I apologize. Give me one minute. No, it's the 9th. I'm clear on the 8th, I'm sorry. I'm clear on the 8th.

THE COURT: Let me see what I've got. If I set this for 2:00 o'clock in the afternoon and then we go till 6:00, will that let you take a morning flight in, Mr. Paduano?

MR. PADUANO: Your Honor, whatever time is convenient for the Court. I'll probably be there the day before.

THE COURT: We can start it -- we can start at 10:45 in the morning, if you-all want to. We'll take a fairly -- at 1:30 I've got a hearing that's going to take about 15 minutes. I've got a 9:00 o'clock. I just want to be sure it's over before everybody shows up, so if you-all want to start at 10:30, 10:45, and then I'll give each side two hours.

MR. PADUANO: 10:30 would be great, Your Honor.

THE COURT: All right. We'll issue the TRO. I'll get all the findings of fact. I've got to incorporate them actually into writing, I think, under the rules for that, but I will get that done. The TRO will probably go out

tonight. If not, it will go out in the morning.

We'll set the hearing for February 8th at 10:30 in the morning on the Preliminary Injunction. By agreement, each side is going to be limited to two hours for their control of court time that will include your direct examination of any witness and any cross-examination. It will include any opening and closing. I'll read your materials beforehand to try and save you having to do an opening. And we'll have the full time allotted.

Just be sure to reserve that time for me, Ms. Smith.

Anything else we need to do today?

MR. PADUANO: Would the Court entertain a -- would it be possible to take some limited discovery in aid of our hearing?

THE COURT: Absolutely. You're entitled to all the discovery that you-all can notice up and get done. If you want me to compel some right now, I'd probably prefer that you-all confer first and if you don't reach an agreement, file a Motion to Compel and I'll get discovery.

MR. PADUANO: Great. We'll do that, Your Honor. Thank you.

MS. KURTZ: The discovery, Your Honor, I just want to be clear, would be in connection with the ownership of the claims?

THE COURT: Well, it's going to have to be connection with the merits of the preliminary injunction that's being sought.

MS. KURTZ: Right. But I mean --

THE COURT: So I don't want to say it's only that because, I mean, there may be some other issues. It isn't obviously an underlying merits discovery, but there may be things that are broader than who owns the claims.

MS. KURTZ: You answered my question in your comment. Thank you.

THE COURT: Thank you. Yes, sir?

MR. MOAK: Your Honor, on behalf of the Committee, obviously we're not parties to the action, but we would like the opportunity to participate at the preliminary injunction hearing. Obviously, Ms. Kurtz --

THE COURT: Whose side are you going to take?

MR. MOAK: We came today to speak in support of Mrs. Kurtz' client, the Debtors, and we will do that at the preliminary injunction hearing and we will coordinate with her, so as not to duplicate our effort. In part, the reason I didn't speak today, Your Honor, was because she basically covered every topic that I would like to have covered, but --

THE COURT: I'm not sure that you'll be a party to it, but if you -- if the other side doesn't object, I'll

deal with it, but certainly I'm going to make you get time from her, out of her two hours.

MR. MOAK: We understand, Your Honor, and we'll coordinate with her. I appreciate that.

THE COURT: But I don't want to make a statement today because I don't know what the other side's position will be as to whether you should be allowed to participate or not.

MR. MOAK: It may be then, Your Honor, in light of that, we may file a Motion to Intervene. I'm just going to try to give that --

THE COURT: If you file a Motion to Intervene, I'll take it up at that point.

MR. MOAK: Thank you, Your Honor.

THE COURT: Thank you.

Anybody else need anything clarified today?

(No audible response.)

THE COURT: Okay. Thank you for the presentation. I appreciate getting educated about this. I will get a TRO out, I hope before I go home tonight.

Thank you.

MR. PADUANO: Thank you, Your Honor.

(Proceeding adjourned at 4:12 p.m.)

* * * * *

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s lmartin

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JUDICIAL TRANSCRIBERS OF TEXAS, INC.

JTT JOB/INVOICE # 28061

DATE: JANUARY 25, 2010

EXHIBIT C

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
DEEP MARINE HOLDINGS, INC., *et al*,	§	**Case No. 09-39313**
Debtor(s).	§	
	§	**Chapter 11**
	§	
DEEP MARINE HOLDINGS, INC., *et al*,	§	
Plaintiff(s)	§	
	§	
VS.	§	**Adversary No. 10-3026**
	§	
FLI DEEP MARINE LLC, *et al*,	§	
Defendant(s).	§	**Judge Isgur**

MEMORANDUM OPINION

For the reasons set forth below, the Court grants, in part, and denies, in part, the Liquidating Trustee's Motion for Summary Judgment.

Background

On December 4, 2009, Deep Marine Holdings, Inc. ("DMH"), Deep Marine Technology Incorporated ("DMT"), Deep Marine 1, LLC, Deep Marine 2, LLC, Deep Marine 3, LLC and Deep Marine 4, LLC (collectively, the "Debtors") each filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code.

Prior to the Debtors' bankruptcy filing, two actions (the "Delaware Actions") had been filed in the Delaware Chancery Court against DMH, DMT, and former officers, directors, or shareholders of the Debtors (collectively, the "Delaware Defendants").[1] The plaintiffs (the

[1] On October 26, 2009, Delaware Plaintiffs FLI Deep Marine LLC, Bressner Partners Ltd., Logan Langberg, and Harley Langberg filed a complaint in the Delaware Chancery Court initiating *FLI Deep Marine LLC, Bressner Partners Ltd., Logan Langberg, and Harley Langberg v. Paul McKim, B.J. Thomas, Daniel Erickson, Francis Wade Abadie, Otto Candies, Jr., Otto Candies, III, Eugene DePalma, Larry Lenig, John Ellingboe, Bruce Gilman, John Hudgens, Nasser Kazeminy, DCC Ventures, LLC, NJK Holdings Corporation, NKOC, Inc., Otto Candies, LLC, Deep Marine Holdings, Inc. and Deep Marine Technology Inc.*, No. 5020-VCS, which is now pending before Vice Chancellor Strine.

"Delaware Plaintiffs") in the Delaware Actions are former minority shareholders of the Debtors.[2] The Delaware Plaintiffs asserted the following causes of action against one or more of the Delaware Defendants[3]:

1. Breach of fiduciary duty against the officers and directors of the Debtors;
2. Breach of fiduciary duty against allegedly controlling shareholders of the Debtors;
3. Unjust enrichment against allegedly controlling shareholders of the Debtors;
4. Aiding and abetting a breach of fiduciary duty against allegedly controlling shareholders of the Debtors;
5. Aiding and abetting a breach of fiduciary duty against officers and directors of the Debtors;
6. Fraud through active concealment of material facts against all Delaware Defendants;
7. Fraud through silence in the face of a duty to disclose against all Delaware Defendants;
8. Wrongful equity dilution against allegedly controlling shareholders of Debtors.

On January 19, 2010, the Debtors initiated this lawsuit against the Delaware Plaintiffs by filing Debtor's Original Complaint and Application for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction (ECF No. 1) . The Complaint alleges that the Delaware Actions contain derivative claims that are property of the Debtors' estates pursuant to 11 U.S.C. § 541. Among other things, the Complaint seeks: (i) a declaratory judgment that the

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On October 30, 2009, Deepwork Inc. filed a complaint initiating *Deepwork Inc. v. Paul McKim, B.J. Thomas, Daniel Erickson, Francis Wade Abadie, Otto Candies, Jr., Otto Candies, III, Eugene DePalma, Larry Lenig, John Ellingboe, Bruce Gilman, John Hudgens, Nasser Kazeminy, DCC Ventures, LLC, NJK Holdings Corporation, NKOC, Inc., Otto Candies, LLC, Deep Marine Holdings, Inc. and Deep Marine Technology Inc.*, No. 5032-VCS, which is also now pending before Vice Chancellor Strine.

[2] The Delaware Plaintiffs were originally shareholders of DMT. Their DMT shares were allegedly subsequently exchanged for shares in DMH. For the sake of simplicity, the Court refers to Delaware Plaintiffs as shareholders of DMT throughout this opinion.

[3] The Delaware Plaintiffs also asserted claims for appraisal rights and an accounting against the Debtors. These claims are not in dispute in this adversary proceeding.

Delaware Actions are property of the Debtors' estates; (ii) a temporary restraining order barring the Delaware Plaintiffs from prosecuting the Delaware Actions until the Court has determined which actions are property of the bankruptcy estates; and (iii) a preliminary and permanent injunction enjoining Delaware Plaintiffs from any act to obtain possession or exercise control over property of the estates.

On January 21, 2010, the Court granted the Debtors' request for a temporary restraining order. The Temporary Restraining Order (ECF No. 16) provided, in part, that:

> Pursuant to Rule 7065 of the Federal Rules of Bankruptcy Procedure, it is ordered that the Defendants, and all persons working in active concert with them, are restrained from prosecuting (i) Case No. 5020-VCS pending in the Court of Chancery of the State of Delaware; (ii) Case No. 5032-VCS pending in the Court of Chancery of the State of Delaware; and (iii) any other lawsuit arising out of the facts and circumstances described in either of the two foregoing lawsuits; provided, this Temporary Restraining Order does not preclude the Defendants from filing any lawsuit that is submitted to and approved for filing by this Court.[4]

On June 2, 2010, the Court confirmed the Debtors' bankruptcy plan, which authorized the sale of substantially all of the Debtors' assets. The confirmation order transferred all of Debtors' remaining assets to a Liquidating Trust and appointed John Bittner to the position of Liquidating Trustee. Bittner's duties include, among other things, handling claims owned by the Liquidating Trust.

On February 16, 2011, the Liquidating Trustee filed Plaintiff's Motion for Summary Judgment (ECF No. 133). The Liquidating Trustee argues that the Delaware Actions primarily allege that some or all of the Delaware Defendants misused corporate funds, engaged in corporate looting, failed to follow corporate formalities, and/or grossly mismanaged the Debtors.

[4] The parties subsequently agreed that the Temporary Restraining Order would remain in effect until the Court holds a preliminary injunction hearing.

According to the Liquidating Trustee, the Delaware Actions are, essentially, corporate looting lawsuits. If that is true, the Delaware Actions would constitute derivative actions belonging solely to the Liquidating Trust. The Liquidating Trustee requests a permanent injunction containing injunctive language that is nearly identical to the January 21, 2010 Temporary Restraining Order.

On March 16, 2011, one of the Delaware Plaintiffs,[5] FLI Deep Marine LLC ("FLI"), filed the Response of Defendant FLI Deep Marine LLC to Plaintiff's Motion for Summary Judgment (ECF No. 137). FLI claims that it does not seek to pursue any of the derivative claims that belong to the Liquidating Trustee. FLI's Response does not attempt to counter the majority of the Liquidating Trustee's arguments in his Motion for Summary Judgment, essentially conceding that most of the underlying claims in the Delaware Actions are derivative.

Instead, FLI requests the Court's permission to file an amended complaint in the Delaware Court of Chancery asserting only three allegedly direct claims (the "Allegedly Direct Claims"). Specifically, FLI's Allegedly Direct Claims are claims against: (i) certain Delaware Defendants designated by FLI as the "Controlling Shareholders"[6] for (a) breach of the fiduciary duty owed by the Controlling Shareholders to FLI and (b) for shareholder oppression; and (ii) Joseph Grano, Jr. for aiding and abetting the Controlling Shareholders' breach of fiduciary duty owed to FLI. FLI argues that its claims for breach of fiduciary duty, oppression, and aiding and abetting are direct claims because they seek redress for harm inflicted directly upon FLI.

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[5] Bressner Partners Ltd., Logan Langberg, Harley Langberg, and Deepwork Inc. have not responded to the Liquidating Trustee's Motion for Summary Judgment.

[6] The "Controlling Shareholders" include: (i) Nasser Kazeminy; (ii) DCC Ventures, LLC, a company allegedly owned or controlled by Kazeminy; (iii) NJK Holdings Corporation, a company allegedly owned or controlled by Kazeminy; (iv) Otto Candies, Jr.; (v) Otto Candies, III; (vi) Otto Candies, LLC, a company allegedly owned or controlled by Candies, Jr. and Candies, III; and (vii) the Triomphe Investors, LLC, a company allegedly owned or controlled by Kazeminy's son, Nader Kazeminy.

Summary Judgment Standard

Summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Fed. R. Bankr. P. 7056 incorporates Rule 56 in adversary proceedings.

A party seeking summary judgment must demonstrate: (i) an absence of evidence to support the non-moving party's claims or (ii) an absence of a genuine dispute of material fact. *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 326 (5th Cir. 2009); *Warfield v. Byron*, 436 F.3d 551, 557 (5th Cir. 2006). A genuine dispute of material fact is one that could affect the outcome of the action or allow a reasonable fact finder to find in favor of the nonmoving party. *Brumfield v. Hollins,* 551 F.3d 322, 326 (5th Cir. 2008).

A court views the facts and evidence in the light most favorable to the non-moving party at all times. *Campo v. Allstate Ins. Co.*, 562 F.3d 751, 754 (5th Cir. 2009). Nevertheless, the Court is not obligated to search the record for the non-moving party's evidence. *Malacara v. Garber*, 353 F.3d 393, 405 (5th Cir. 2003). A party asserting that a fact cannot be or is genuinely disputed must support the assertion by citing to particular parts of materials in the record, showing that the materials cited do not establish the absence or presence of a genuine dispute, or showing that an adverse party cannot produce admissible evidence to support the fact.[7] Fed. R. Civ. P. 56(c)(1). The Court need consider only the cited materials, but it may consider other materials in the record. Fed. R. Civ. P. 56(c)(3). The Court should not weigh the evidence. A credibility determination may not be part of the summary judgment analysis. *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007). However, a party may object

[7] If a party fails to support an assertion or to address another party's assertion as required by Rule 56(c), the Court may (1) give an opportunity to properly support or address the fact; (2) consider the fact undisputed for purposes of the motion; (3) grant summary judgment if, taking the undisputed facts into account, the movant is entitled to it; or (4) issue any other appropriate order. Fed. R. Civ. P. 56(e).

that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence. Fed. R. Civ. P. 56(c)(2).

"The moving party bears the burden of establishing that there are no genuine issues of material fact." *Norwegian Bulk Transp. A/S v. Int'l Marine Terminals P'ship*, 520 F.3d 409, 412 (5th Cir. 2008). The evidentiary support needed to meet the initial summary judgment burden depends on whether the movant bears the ultimate burden of proof at trial.

If the movant bears the burden of proof on an issue, a successful motion must present evidence that would entitle the movant to judgment at trial. *Malacara*, 353 F.3d at 403. Upon an adequate showing, the burden shifts to the non-moving party to establish a genuine dispute of material fact. *Sossamon*, 560 F.3d at 326. The non-moving party must cite to specific evidence demonstrating a genuine dispute. Fed. R. Civ. P. 56(c)(1); *Celotex Corp. v. Cattrett*, 477 U.S. 317, 324 (1986). The nonmoving party must also "articulate the manner in which that evidence supports that party's claim." *Johnson v. Deep E. Tex. Reg'l Narcotics Trafficking Task Force*, 379 F.3d 293, 301 (5th Cir. 2004). Even if the movant meets the initial burden, the motion should be granted only if the non-movant cannot show a genuine dispute of material fact.

If the nonmovant bears the burden of proof of an issue, the movant must show the absence of sufficient evidence to support an essential element of the non-movant's claim. *Norwegian Bulk Transp. A/S*, 520 F.3d at 412. Upon an adequate showing of insufficient evidence, the non-movant must respond with sufficient evidence to support the challenged element of its case. *Celotex*, 477 U.S. at 324. The motion should be granted only if the non-movant cannot produce evidence to support an essential element of its claim. *Condrey v. Suntrust Bank of Ga.*, 431 F.3d 191, 197 (5th Cir. 2005).

Issue Presented

For the purposes of his Motion for Summary Judgment, the Liquidating Trustee stipulates that all facts alleged by the Delaware Plaintiffs in the Delaware Actions are true. Accordingly, the Court's task is only to determine whether the claims asserted in the Delaware Actions are direct or derivative claims.

Facts

The Court summarizes the factual allegations of the Delaware Actions. The allegations are assumed true for the purposes of this Memorandum Opinion.

The Delaware Plaintiffs were early investors in DMT, originally purchasing shares in the company in 2002. By 2006, the Delaware Plaintiffs' shares of DMT common stock represented more than 8.5% of the company's overall outstanding common stock. The Delaware Plaintiffs have collectively invested over $1.73 million in DMT.

This is a case primarily about the Controlling Shareholders' alleged usurpation of power over, mismanagement and looting of the Debtors, and the failure of the Debtors' officers and directors to prevent the Controlling Shareholders from doing so. The Controlling Shareholders include: (i) Nasser Kazeminy; (ii) DCC Ventures, LLC, a company allegedly owned or controlled by Kazeminy; (iii) NJK Holdings Corporation, a company allegedly owned or controlled by Kazeminy; (iv) Otto Candies, Jr. and (v) Otto Candies, III; (vi) Otto Candies, LLC, a company allegedly owned or controlled by Candies, Jr. and Candies, III (collectively "Candies"); and (vii) the Triomphe Investors, LLC, a company allegedly owned or controlled by Kazeminy's son, Nader Kazeminy. For the sake of simplicity, any reference to "Kazeminy and Candies" in this Memorandum Opinion should be considered as synonymous with "Controlling Shareholders."

Kazeminy (and companies he owned or controlled) became the majority shareholder of the Debtors. Candies subsequently gained a significant portion of ownership in the Debtors. Kazeminy and Candies collectively became owners of 90% of the Debtors' outstanding common stock. Kazeminy and Candies then allegedly used their control over the Debtors and their officers and directors to benefit themselves at the Debtors' and their shareholders expense.

1. Transactions Between Otto Candies, LLC and DMT—as Alleged in Delaware Complaint

DMT regularly did business with Otto Candies, LLC which supplied vessels for DMT's subsea projects. Due to Candies' relationship with Kazeminy and the officers and directors of DMT, the business transactions between Otto Candies, LLC and DMT were often not at arms-length and resulted in DMT incurring substantial losses.

For instance, during 2006, 2007, and 2008, Otto Candies, LLC repeatedly misrepresented the state of its vessels and then charged DMT hundreds of thousands of dollars to lease and charter vessels that were broken, poorly built, or not able to meet U.S. Coast Guard regulations. This forced DMT to pay substantial sums to repair the defective vessels that Otto Candies, LLC had off-loaded onto it. It also resulted in the loss of valuable contracts with DMT's customers and, consequently, the loss of millions of dollars in revenue.

Otto Candies, LLC also sold vessels to the Debtors at inflated prices. In May 2007, Candies and Kazeminy caused DMT to pay $6 million above the contracted price to purchase a vessel, later named the Emerald, simply because Candies demanded such amount at the closing of the sale transaction. In October 2007, DMT purchased the vessels the Agnes and the Sapphire. The consideration for the purchase was $35 million in DMT stock, although the two vessels were worth no more than $28 million. This resulted in an overpayment to Candies of at least $7 million.

As in the Agnes and Sapphire transaction, DMT at times paid Candies in convertible debt, instead of cash, for services and vessels. When Candies converted the DMT debt into DMT common equity, Candies received more DMT shares than it would have received had DMT not overpaid for the assets and services. This diluted Delaware Plaintiffs' shares and enabled Candies to join Kazeminy as Controlling Shareholders of the Debtors.

2. Improper Payments Made by DMT—as Alleged in Delaware Complaint

Kazeminy's influence over DMT is evidenced by the improper payments that were made at his direction. First, at Kazeminy's direction, DMT sent three payments of $25,000.00 each to a former United States Senator from Minnesota, Norm Coleman, through an insurance company that employed Senator Coleman's wife. Kazeminy's relative, Behnaz Ghaufouri, received a $6,000.00 transfer from DMT. These payments were made despite the fact that neither Coleman nor Ghafouri performed any services for DMT.

3. The Short-Form Merger—as Alleged in Delaware Complaint

On October 10, 2008, after learning of, among other things, Candies' self-dealing and the payments to Senator Coleman, the Delaware Plaintiffs sent a shareholder demand letter to the DMT board of directors. The Delaware Plaintiffs demanded an investigation into the alleged wrongful conduct. DMT responded by establishing a special committee to investigate the allegations raised in the demand letter. According to the Delaware Plaintiffs, this special committee was not independent and failed to conduct a proper investigation. On June 30, 2009, the special committee released a press statement declaring that it found no wrongdoing over the course of its investigation.

The day after the press statement's release, as part of a scheme to deprive the Delaware Plaintiffs of their standing to bring derivative claims, Kazeminy and Candies commenced and

concluded a Delaware Section 253 short-form merger. The short-form merger was entered into between the Debtors and NKOC, Inc.[8] The Delaware Plaintiffs were not notified and did not consent to the merger.

On July 11, 2009, ten days after the merger, the Delaware Plaintiffs were notified of the merger and offered one cent per share for their DMT shares. Although the company was purportedly valued as worth over $100 million in the 18 months preceding the merger, the notice of merger stated that the company had become so bereft of assets and laden with debt as to be worth nothing at all. The merger compensation totaled $22,000.00 for all minority shares of DMT.

The short-form merger effectively terminated the Delaware Plaintiffs' ownership in the Debtors and rendered the Controlling Shareholders 100% owners of the Debtors.

Analysis[9]

A derivative lawsuit is an action that is commenced by a corporation's shareholder on behalf of the corporation for harm allegedly done to the corporation. *Tooley v. Donaldson, Lufkin & Jenrette, Inc.* 845 A.2d 1031, 1036 (Del. 2004). "Because a derivative suit is being brought on behalf of the corporation, the recovery, if any, must go to the corporation." *Id.* A shareholder may also bring a direct action for direct injuries to the shareholder's legal rights as a shareholder. *Id.* In such direct lawsuits, "the recovery or other relief flows directly to the stockholders, not to the corporation." *Id.*

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[8] NKOC is named after the initials of Nasser Kazeminy and Otto Candies. NCOK was merged into DMH and NCOK's separate corporate existence ceased as of the date of the merger.

[9] The parties agree that Delaware law governs this dispute. *See also In re Dexterity Surgical, Inc.*, 365 B.R. 690, 695 (Bankr. S.D. Tex. 2007) "Under Texas law, actions involving the internal affairs of a foreign corporation are governed by the law of the state of incorporation.") (citations omitted).

In order to determine whether a claim is direct or derivative, the "analysis must be based solely on the following questions: Who suffered the alleged harm—the corporation or the suing stockholder individually—and who would receive the benefit of the recovery or other remedy"? *Id.* at 1035. Courts must "look to the nature of the wrong and to whom the relief should go." *Id.* at 1039. In order to have a direct claim, a "stockholder's claimed direct injury must be independent of any alleged injury to the corporation." *Id.* "The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation." *Id.*

Furthermore, under *Tooley*, "the duty of the court is to look at the nature of the wrong alleged, not merely at the form of words used in the complaint." *In re J.P. Morgan Chase & Co.'s S'Holders Litig.*, 906 A.2d 808, 817 (Del. 2005) (internal citation omitted). "Instead the court must look to all the facts of the complaint and determine for itself whether a direct claim exists." *Id.* (internal citation omitted).

The possible derivative and direct causes of action fall into three categories. First are the claims that are clearly derivative, where the shareholder's injury flows directly from harm to the corporation. As an example, a derivative claim would exist if a corporate executive breaches a fiduciary duty and approves improper financial transactions, resulting in harm to the corporation and a consequent reduction in the value of stock held by shareholders. The second category is that of clearly direct claims, where the stockholder proves an individualized injury but where the corporation is unharmed as a result. The third category is where certain shareholders suffer an individualized injury in addition to an injury to the corporation as a whole, which may result in both direct and derivative claims. The Court in *Tooley* stated that "the stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail

without showing an injury to the corporation." 845 A.2d at 1039. This does not mean, however, that all shareholder claims are derivative if they result from a transaction injuring both the corporation and shareholders. *See Gentile v. Rossette*, 906 A.2d 91 (Del. 2006) (holding that, under *Tooley*, independent harms to a corporation and to certain shareholders may derive from the same transaction, resulting in direct and derivative claims for the shareholders).

The Court must now analyze each of the Delaware Plaintiffs' claims for the purpose of determining whether they constitute direct or derivative claims. As set forth below, all of the claims except those relating to the allegation of an independent injury (here, equity dilution and expropriation of economic value) are derivative claims.

1. Breach of Fiduciary Duty Against Debtors' Officers and Directors

The Delaware Plaintiffs' first claim at issue is for breach of fiduciary duty against DMT's officers and directors. The Delaware Plaintiffs allege that the actions of DMT's officers and directors, in aiding and approving DMT actions for the private purposes of the Controlling Shareholders, were without merit, served no legitimate business purpose, and were not in the best interests of DMT and/or its shareholders. These actions include gross misuse of corporate funds, self-dealing, equity dilution, failure to follow corporate formalities, and gross mismanagement.

The Liquidating Trustee argues that the Delaware Plaintiffs' breach of fiduciary duty claim against the officers and directors arises out of harm inflicted upon the Debtors, not the minority shareholders. According to the Liquidating Trustee, it was the Debtors' funds that were allegedly misused, the Debtors' opportunities that have been lost because of alleged self-dealing, the Debtors' operations hurt by the alleged failure to follow corporate formalities, and the Debtors' business damaged by the alleged mismanagement.

FLI's Response to the Liquidating Trustee's Motion for Summary Judgment does not contest the Liquidating Trustee's argument on this point. FLI essentially concedes that the breach of fiduciary duty claim against DMT's officers and directors is a derivative claim.

The Court largely agrees with the Liquidating Trustee that the breach of fiduciary duty claim asserted by the Delaware Plaintiffs against the Debtors' officers and directors is derivative. For example, the harm caused by the officers and directors concerning Candies' allegedly inflated sale prices for Candies' vessels was borne by the Debtors. The same can be said for the payments allegedly made to Senator Coleman. Likewise, it is the Debtors who would reap any recovery against Candies for overcharges or Senator Coleman for the $75,000.00 in alleged improper transfers.

The missing link in most of the Delaware Plaintiffs' allegations against the Debtors' officers and directors is an independent injury suffered by the Delaware Plaintiffs. For instance, there is no doubt that the substantial overpayments allegedly collected by Candies damaged shareholder value by decreasing the Debtors' equity. But that harm corresponded to the primary injury, the overpayments themselves, which depleted the Debtors' resources. The decline in shareholder value from overpayments to Candies is not an injury that is independent of any injury to the Debtors.

On the other hand, the Court finds that certain allegations involving equity dilution and expropriation of value must survive the Liquidating Trustee's Motion for Summary Judgment because they contain an independent injury. A claim of breach of fiduciary duty by corporate officers or directors related to this independent injury is direct. This relates to the allegation that Candies was, at times, overpaid through the Debtors' issuance of convertible notes in Candies'

favor. Candies later converted these notes into DMT equity, thereby diluting the Delaware Plaintiffs' ownership stake in the Debtors and expropriating some of its value.

Generally speaking, "claims of overpayment are treated as causing harm solely to the corporation and, thus, are regarded as derivative." *Rossette*, 906 A.2d at 99. However, Delaware law recognizes that one variation of corporate overpayment results in both direct and derivative claims. This is where "(1) a stockholder having majority or effective control causes the corporation to issue 'excessive' shares of its stock in exchange for assets of the controlling stockholder that have a lesser value; and (2) the exchange causes an increase in the percentage of the outstanding shares owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public (minority) shareholders." *Id.* at 100. In a normal overpayment situation, "dilution in value of the corporation's stock is merely the unavoidable result . . . of the reduction in the value of the entire corporate entity, of which each share of equity represents an equal fraction." *Id.* at 99. Therefore in the normal overpayment situation, the stockholders have only a derivative claim. *Id.* In the above atypical situation where shares are issued to a controlling shareholder for the purposes of diluting the holdings of minority shareholders, "[a] separate harm also results: an extraction from the [minority] shareholders, and a redistribution to the controlling shareholder, of a portion of the economic value and voting power embodied in the minority interest. As a consequence the [minority] shareholders are harmed, uniquely and individually, to the same extent that the controlling shareholder is (correspondingly) benefitted." *Id.* at 100. The claim for recovery of the overpayment by the corporation is still, of course, derivative. *Id.* However, the minority shareholders also have a direct claim for the expropriation of value from their equity interests that benefitted the majority shareholders. *Id.* This type of situation, in which harm befalls both the corporation and the

minority shareholders, falls into the third category listed above. It passes the *Tooley* test, because although separate harms to the corporation and the shareholder result from the same transaction, they are independent of one another. *Id.* at 99.

An important aspect of the situation described in *Rossette* is that the form of overpayment must be stock in order for the dual harms to result. *Id.* at 100. However, the issuance of sham convertible notes might inflict similar injury. If the issuance of convertible notes were a sham, intended at the outset to be converted into equity, the Debtors' balance sheet would reflect only a sham liability for the convertible notes. It would be a temporary, fictitious liability that would evaporate once the conversion was executed. Just like an issuance of additional shares for no consideration, this would create unique harm to the minority shareholders. The substance of the Debtors' assets and liabilities would be unaffected from beginning to end, and therefore neither transaction would result in injury to the Debtor. All of the injury would flow to the allegedly-diluted minority shareholders.

When a worthless (or hyper-valued) asset is obtained for stock (or, for that matter, for sham convertible notes that are the equivalent of stock) issued to majority shareholders, only the minority shareholders would suffer true injury. Although the corporation might temporarily record the inflated value on its books, marketplace realities would eventually control valuation. When the asset was then reduced to true market value, the only lasting effect would be on the now-diluted minority shareholders. Their ownership percentage in the Debtor would decrease due to the issuance of stock (or the sham conversion). The Debtor's total equity remains unchanged since nothing was paid for the stock, while the minority shareholders' percentage of the Debtor's total equity decreases. This represents a unique and independent injury suffered by the Delaware Plaintiffs. *See In re J.P. Morgan Chase & Co.*, 906 A.2d 808, 818 (Del. Ch. 2005)

(a direct claim exists "where a significant stockholder's interest is increased at the sole expense of the minority") (internal citation omitted).

Accordingly, to the extent that the Delaware Plaintiffs allege an independent injury concerning equity dilution and expropriation of value from their holdings, falling into either the second or third category above, the Liquidating Trustee's Motion for Summary Judgment is denied. With regard to all remaining allegations, the Court holds that the Delaware Plaintiffs' claim for breach of fiduciary duty against the Debtors' officers and directors is a derivative claim and, therefore, property of the Liquidating Trust.

The Court recognizes that this ruling creates a unique fact issue that must be resolved in ensuing litigation—was the issuance of the convertible debt a sham? If the convertible debt was legitimately issued, the harm from the issuance of the debt was suffered by the corporation and the minority shareholder's loss would be derivative. If the issuance of the convertible debt was a sham intended to expropriate value from and dilute the minority shareholders' holdings, then they have suffered a direct injury. The burden of proof must rest on the minority shareholders to demonstrate any such sham.

2. Breach of Fiduciary Duty by the Debtors' Controlling Shareholders

The Delaware Plaintiffs' second claim at issue in the Motion for Summary Judgment is a claim against the Controlling Shareholder Defendants for Breach of Fiduciary Duty. As with the claim against the Corporate Director's and Officers, the Delaware Plaintiffs allege many illegitimate acts by the Controlling Shareholders, including looting, self-dealing, and unfair dilution of the minority shareholder's interest. (ECF No. 1, p. 46).

The Liquidating Trustee argues that this "Delaware Cause of Action is clearly focused on harm to the Debtors, and . . . is a derivative claim that belongs to the Trustee." [MSJ, p. 11] The Court agrees with the Liquidating Trustee regarding most but not all of the allegations.

Except as set forth in the next sentence, the breach of fiduciary duty claims against Debtors' Controlling Shareholders are derivative claims. The breach of fiduciary duty claims against Debtors' Controlling Shareholders are direct claims only to the extent that the alleged breach is (i) the improper issuance of dilutive shares, (ii) the issuance of sham convertible notes for the purpose of dilution, or (iii) an improper use of the Delaware short-form merger that resulted in injury to the Delaware Plaintiffs.

3. Unjust Enrichment Against Debtors' Controlling Shareholders

The Delaware Plaintiffs next claim at issue is for Unjust Enrichment Against Debtors' Controlling Shareholders. They allege that the Controlling Shareholders unjustly enriched themselves with DMT's corporate assets, to the detriment of the Plaintiffs. (ECF No. 1, p. 47).

The Liquidating Trustee again alleges that any claims of unjust enrichment are derivative, and therefore property of the Liquidating Trust. The Court agrees with the Liquidating Trustee insofar as the claims relate to corporate looting and generic self-dealing, with the defendants unjustly enriching themselves with DMT's corporate assets. However, a claim of unjust enrichment via expropriation of value from the minority shareholders' DMT holdings, as opposed to unjust enrichment via theft of corporate assets, is direct. The unjust enrichment claims are derivative except as set forth in the next sentence. The unjust enrichment claims are direct claims only to the extent of injuries from (i) the improper issuance of dilutive shares, (ii) the issuance of sham convertible notes for the purpose of dilution, or (iii) an improper use of the Delaware short-form merger that resulted in injury to the Delaware Plaintiffs..

4. Aiding and Abetting a Breach of Fiduciary Duty Against Debtors' Controlling Shareholders

The aiding and abetting claims are derivative claims to the extent that the actions that were aided or abetted resulted in derivative injuries as set forth in this opinion. To the extent that the actions that were aided and abetted resulted in direct injury, as set forth in this opinion, the aiding and abetting allegations are direct.

5. Aiding and Abetting a Breach of Fiduciary Duty Against Debtors' Officers and Directors

The aiding and abetting claims are derivative claims to the extent that the actions that were aided or abetted resulted in derivative injuries as set forth in this opinion. To the extent that the actions that were aided and abetted resulted in direct injury, as set forth in this opinion, the aiding and abetting allegations are direct.

6. Fraud Through Active Concealment Against All Defendants

The allegations in the Delaware Complaint with respect to this claim relate to efforts by Defendants to shield relevant information about DMT, not to the independent injury allegedly suffered by the Delaware Plaintiffs. This claim is derivative.

7. Fraud Through Silence in the Face of a Duty to Disclose Against All Defendants

As with the claim of Fraud through Active Concealment, the allegations contained in the Complaint do not relate to the independent injury allegedly suffered by the Delaware Plaintiffs. This claim is derivative.

8. Wrongful Equity Dilution Against Debtors' Controlling Shareholders

This issue is fully addressed in the breach of fiduciary duty cause of action against the Debtors' Officers and Shareholders. The Court incorporates the reasoning set forth in that section.

9. Shareholder Oppression

This issue is fully addressed in the breach of fiduciary duty cause of action against the Debtors' Officers and Shareholders. The Court incorporates the reasoning set forth in that section.

Conclusion

For the above stated reasons, the Liquidating Trustee's Motion for Summary Judgment is granted in part and denied in part.

The Court believes that the reasoning in this Memorandum Opinion fully resolves all matters in dispute between the parties. Within 14 days, the parties must either (i) set forth any remaining disputes; or (ii) file a proposed final judgment consistent with this opinion.

SIGNED **June 13, 2011.**

Marvin Isgur
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
DEEP MARINE HOLDINGS, INC., *et al*,	§	**Case No. 09-39313**
Debtor(s).	§	
	§	**Chapter 11**
	§	
DEEP MARINE HOLDINGS, INC., *et al*,	§	
Plaintiff(s)	§	
	§	
VS.	§	**Adversary No. 10-03026**
	§	
FLI DEEP MARINE LLC, *et al*,	§	
Defendant(s).	§	**Judge Isgur**

REPORT AND RECOMMENDATION

This Court issued its Memorandum Opinion on June 13, 2011, in contemplation of entry of a final judgment. *In re Deep Marine Holdings, Inc.*, 2011 WL 2420274 (Bankr. S.D. Tex. June 13, 2011). A copy is attached as Exhibit "A" and incorporated into this Report. Ten days later the Supreme Court handed down *Stern v. Marshall*, 564 U.S. _____ (June 23, 2011). This Court must reconsider its authority to issue a final judgment in this case.

Stern concerned a bankruptcy court's authority over a debtor's common-law counterclaim to a proof of claim filed against the estate. The Supreme Court held that a bankruptcy court may not constitutionally enter a final judgment over a counterclaim that would not necessarily be resolved by the resolution of the proof of claim. *Id.* at *24. The counterclaim did not constitute a "public rights" dispute. *Id.* at *21. Although public rights disputes may be decided by non-Article III tribunals, public rights disputes must involve rights "integrally related to a particular federal government action." *Id.* at *17-18. The Supreme Court held that it would be an impermissible exercise of the judicial power of the United States to enter a final judgment on the counterclaim. *Id.* at *21.

The broader applicability of *Stern* remains unclear. One of the principal issues concerns the extent to which bankruptcy courts may exercise authority over essential bankruptcy matters under the "public rights" exception. In *Thomas v. Union Carbide Agricultural Products Co.*, the Supreme Court held that a right closely integrated into a public regulatory scheme may be resolved by a non-Article III tribunal. 473 U.S. 568, 593 (1985). The Bankruptcy Code is a scheme for restructuring debtor-creditor relations, necessarily including "the exercise of exclusive jurisdiction over all of the debtor's property, the equitable distribution of that property among the debtor's creditors, and the ultimate discharge that gives the debtor a 'fresh start' by releasing him, her, or it from further liability for old debts." *Central Va. Cmty. College v. Katz*, 546 U.S. 356, 363-64 (2006); *see Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982) (plurality opinion) (noting in dicta that the restructuring of debtor-creditor relations "may well be a 'public right'"). *But see Stern*, 2011 WL 2472792, at *20 n.7 ("We noted [in *Granfinanciera*] that we did not mean to 'suggest that the restructuring of debtor-creditor relations is in fact a public right.'").

Assuming *arguendo* the restructuring of debtor-creditor relations is a public right, this Court does not have authority to enter a final judgment in this case. Bankruptcy courts, of course, must be able to protect the bankruptcy estate. However, a final judgment in this case requires a determination that property is or is not a part of the bankruptcy estate. Such a determination is an exercise of the judicial power of the United States. *See* Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 449 (2007) (noting 'judicial power' historically needed "to dispose conclusively of an individual's legal claim to private rights that fit the template of life, physical liberty, or traditional forms of property"). Determining a cause of action to be derivative and an asset of the bankruptcy estate, along with issuing a permanent injunction,

qualifies as a conclusive determination of an individual's legal claim of a private right regarding a form of property.

This Court believes *Stern*'s reasoning does not permit this Court to enter a Final Judgment in the present matter. Therefore, this Court submits this Report and Recommendation to the District Court, recommending it accept the findings of fact and law contained in this Court's June 13, 2011 Memorandum Opinion.

SIGNED **August 4, 2011.**

Marvin Isgur
UNITED STATES BANKRUPTCY JUDGE

Slip Copy, 2011 WL 2420274 (Bkrtcy.S.D.Tex.)
(Cite as: 2011 WL 2420274 (Bkrtcy.S.D.Tex.))

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United States Bankruptcy Court,
S.D. Texas,
Houston Division.
In re DEEP MARINE HOLDINGS, INC., et al, Debtor(s).
Deep Marine Holdings, Inc., et al, Plaintiff(s)
v.
Fli Deep Marine LLC, et al, Defendant(s).

Bankruptcy No. 09–39313.
Adversary No. 10–3026.
June 13, 2011.

Jason Gary Cohen, Laura L. Venta, Marcy E. Kurtz, Bracewell & Giuliani LLP, Houston, TX, for Plaintiffs.

Anthony Paduano, Paduano Weintraub LLP, New York, NY, Lisa M. Mastrodomenico, Jaspan Schlesinger LLP, Garden, TX, Thomas M. Kirkendall, Attorney at Law, The Woodlands, TX, for Defendants.

MEMORANDUM OPINION

MARVIN ISGUR, Bankruptcy Judge.

***1** For the reasons set forth below, the Court grants, in part, and denies, in part, the Liquidating Trustee's Motion for Summary Judgment.

Background

On December 4, 2009, Deep Marine Holdings, Inc. ("DMH"), Deep Marine Technology Incorporated ("DMT"), Deep Marine 1, LLC, Deep Marine 2, LLC, Deep Marine 3, LLC and Deep Marine 4, LLC (collectively, the "Debtors") each filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code.

Prior to the Debtors' bankruptcy filing, two actions (the "Delaware Actions") had been filed in the Delaware Chancery Court against DMH, DMT, and former officers, directors, or shareholders of the Debtors (collectively, the "Delaware Defendants").[FN1] The plaintiffs (the "Delaware Plaintiffs") in the Delaware Actions are former minority shareholders of the Debtors.[FN2] The Delaware Plaintiffs asserted the following causes of action against one or more of the Delaware Defendants[FN3]:

FN1. On October 26, 2009, Delaware Plaintiffs FLI Deep Marine LLC, Bressner Partners Ltd., Logan Langberg, and Harley Langberg filed a complaint in the Delaware Chancery Court initiating *FLI Deep Marine LLC, Bressner Partners Ltd., Logan Langberg, and Harley Langberg v. Paul McKim, B.J. Thomas, Daniel Erickson, Francis Wade Abadie, Otto Candies, Jr., Otto Candies, III, Eugene DePalma, Larry Lenig, John Ellingboe, Bruce Gilman, John Hudgens, Nasser Kazeminy, DCC Ventures, LLC, NJK Holdings Corporation, NKOC, Inc., Otto Candies, LLC, Deep Marine Holdings, Inc. and Deep Marine Technology Inc.*, No. 5020–VCS, which is now pending before Vice Chancellor Strine.

On October 30, 2009, Deepwork Inc. filed a complaint initiating *Deepwork Inc. v. Paul McKim, B.J. Thomas, Daniel Erickson, Francis Wade Abadie, Otto Candies, Jr., Otto Candies, III, Eugene DePalma, Larry Lenig, John Ellingboe, Bruce Gilman, John Hudgens, Nasser Kazeminy, DCC Ventures, LLC, NJK Holdings Corporation, NKOC, Inc., Otto Candies, LLC, Deep Marine Holdings, Inc. and Deep Marine Technology Inc.*, No. 5032–VCS, which is also now pending before Vice Chancellor Strine.

FN2. The Delaware Plaintiffs were originally shareholders of DMT. Their DMT shares were allegedly subsequently exchanged for shares in DMH. For the sake of simplicity, the Court refers to Delaware Plaintiffs as shareholders of DMT throughout this opinion.

FN3. The Delaware Plaintiffs also asserted claims for appraisal rights and an accounting against the Debtors. These claims are not in dispute in this adversary proceeding.

1. Breach of fiduciary duty against the officers and directors of the Debtors;

2. Breach of fiduciary duty against allegedly controlling shareholders of the Debtors;

3. Unjust enrichment against allegedly controlling shareholders of the Debtors;

4. Aiding and abetting a breach of fiduciary duty against allegedly controlling shareholders of the Debtors;

5. Aiding and abetting a breach of fiduciary duty against officers and directors of the Debtors;

6. Fraud through active concealment of material facts against all Delaware Defendants;

7. Fraud through silence in the face of a duty to disclose against all Delaware Defendants;

8. Wrongful equity dilution against allegedly controlling shareholders of Debtors.

On January 19, 2010, the Debtors initiated this lawsuit against the Delaware Plaintiffs by filing Debtor's Original Complaint and Application for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction (ECF No. 1). The Complaint alleges that the Delaware Actions contain derivative claims that are property of the Debtors' estates pursuant

to 11 U.S.C. § 541. Among other things, the Complaint seeks: (i) a declaratory judgment that the Delaware Actions are property of the Debtors' estates; (ii) a temporary restraining order barring the Delaware Plaintiffs from prosecuting the Delaware Actions until the Court has determined which actions are property of the bankruptcy estates; and (iii) a preliminary and permanent injunction enjoining Delaware Plaintiffs from any act to obtain possession or exercise control over property of the estates.

On January 21, 2010, the Court granted the Debtors' request for a temporary restraining order. The Temporary Restraining Order (ECF No. 16) provided, in part, that:

> Pursuant to Rule 7065 of the Federal Rules of Bankruptcy Procedure, it is ordered that the Defendants, and all persons working in active concert with them, are restrained from prosecuting (i) Case No. 5020–VCS pending in the Court of Chancery of the State of Delaware; (ii) Case No. 5032–VCS pending in the Court of Chancery of the State of Delaware; and (iii) any other lawsuit arising out of the facts and circumstances described in either of the two foregoing lawsuits; provided, this Temporary Restraining Order does not preclude the Defendants from filing any lawsuit that is submitted to and approved for filing by this Court.[FN4]

> FN4. The parties subsequently agreed that the Temporary Restraining Order would remain in effect until the Court holds a preliminary injunction hearing.

***2** On June 2, 2010, the Court confirmed the Debtors' bankruptcy plan, which authorized the sale of substantially all of the Debtors' assets. The confirmation order transferred all of Debtors' remaining assets to a Liquidating Trust and appointed John Bittner to the position of Liquidating Trustee. Bittner's duties include, among other things, handling claims owned by the Liquidating Trust.

On February 16, 2011, the Liquidating Trustee filed Plaintiff's Motion for Summary Judgment (ECF No. 133). The Liquidating Trustee argues that the Delaware Actions primarily allege that some or all of the Delaware Defendants misused corporate funds, engaged in corporate looting, failed to follow corporate formalities, and/or grossly mismanaged the Debtors. According to the Liquidating Trustee, the Delaware Actions are, essentially, corporate looting lawsuits. If that is true, the Delaware Actions would constitute derivative actions belonging solely to the Liquidating Trust. The Liquidating Trustee requests a permanent injunction containing injunctive language that is nearly identical to the January 21, 2010 Temporary Restraining Order.

On March 16, 2011, one of the Delaware Plaintiffs,[FN5] FLI Deep Marine LLC ("FLI"), filed the Response of Defendant FLI Deep Marine LLC to Plaintiff's Motion for Summary Judgment (ECF No. 137). FLI claims that it does not seek to pursue any of the derivative claims that belong to the Liquidating Trustee. FLI's Response does not attempt to counter the majority of the Liquidating Trustee's arguments in his Motion for Summary Judgment, essentially conceding that most of the underlying claims in the Delaware Actions are derivative.

> FN5. Bressner Partners Ltd., Logan Langberg, Harley Langberg, and Deepwork Inc. have not responded to the Liquidating Trustee's Motion for Summary Judgment.

Instead, FLI requests the Court's permission to file an amended complaint in the Delaware Court of Chancery asserting only three allegedly direct claims (the "Allegedly Direct Claims"). Specifically, FLI's Allegedly Direct Claims are claims against: (i) certain Delaware Defendants designated by FLI as the "Controlling Shareholders" FN6 for (a) breach of the fiduciary duty owed by the Controlling Shareholders to FLI and (b) for shareholder oppression; and (ii) Joseph Grano, Jr. for aiding and abetting the Controlling Shareholders' breach of fiduciary duty owed to FLI. FLI argues that its claims for breach of fiduciary duty, oppression, and aiding and abetting are direct claims because they seek redress for harm inflicted directly upon FLI.

FN6. The "Controlling Shareholders" include: (i) Nasser Kazeminy; (ii) DCC Ventures, LLC, a company allegedly owned or controlled by Kazeminy; (iii) NJK Holdings Corporation, a company allegedly owned or controlled by Kazeminy; (iv) Otto Candies, Jr.; (v) Otto Candies, III; (vi) Otto Candies, LLC, a company allegedly owned or controlled by Candies, Jr. and Candies, III; and (vii) the Triomphe Investors, LLC, a company allegedly owned or controlled by Kazeminy's son, Nader Kazeminy.

Summary Judgment Standard

Summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). Fed. R. Bankr.P. 7056 incorporates Rule 56 in adversary proceedings.

A party seeking summary judgment must demonstrate: (i) an absence of evidence to support the non-moving party's claims or (ii) an absence of a genuine dispute of material fact. *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 326 (5th Cir.2009); *Warfield v.. Byron*, 436 F.3d 551, 557 (5th Cir.2006). A genuine dispute of material fact is one that could affect the outcome of the action or allow a reasonable fact finder to find in favor of the nonmoving party. *Brumfield v. Hollins*, 551 F.3d 322, 326 (5th Cir.2008).

***3** A court views the facts and evidence in the light most favorable to the non-moving party at all times. *Campo v. Allstate Ins. Co.*, 562 F.3d 751, 754 (5th Cir.2009). Nevertheless, the Court is not obligated to search the record for the non-moving party's evidence. *Malacara v. Garber*, 353 F.3d 393, 405 (5th Cir.2003). A party asserting that a fact cannot be or is genuinely disputed must support the assertion by citing to particular parts of materials in the record, showing that the materials cited do not establish the absence or presence of a genuine dispute, or showing that an adverse party cannot produce admissible evidence to support the fact.FN7 Fed.R.Civ.P. 56(c)(1). The Court need consider only the cited materials, but it may consider other materials in the record. Fed.R.Civ.P. 56(c)(3). The Court should not weigh the evidence. A credibility determination may not be part of the summary judgment analysis. *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir.2007). However, a party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence. Fed.R.Civ.P. 56(c)(2).

FN7. If a party fails to support an assertion or to address another party's assertion as required by Rule 56(c), the Court may (1) give an opportunity to properly support or address the fact; (2) consider the fact undisputed for purposes of the motion; (3) grant summary judgment if, taking the undisputed facts into account, the movant is entitled to it; or (4) issue any other appropriate order. Fed.R.Civ.P. 56(e).

"The moving party bears the burden of establishing that there are no genuine issues of material fact." *Norwegian Bulk Transp. A/S v. Int'l Marine Terminals P'ship*, 520 F.3d 409, 412 (5th Cir.2008). The evidentiary support needed to meet the

initial summary judgment burden depends on whether the movant bears the ultimate burden of proof at trial.

If the movant bears the burden of proof on an issue, a successful motion must present evidence that would entitle the movant to judgment at trial. *Malacara*, 353 F.3d at 403. Upon an adequate showing, the burden shifts to the non-moving party to establish a genuine dispute of material fact. *Sossamon*, 560 F.3d at 326. The non-moving party must cite to specific evidence demonstrating a genuine dispute. Fed.R.Civ.P. 56(c)(1); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). The nonmoving party must also "articulate the manner in which that evidence supports that party's claim." *Johnson v. Deep E. Tex. Reg'l Narcotics Trafficking Task Force*, 379 F.3d 293, 301 (5th Cir.2004). Even if the movant meets the initial burden, the motion should be granted only if the non-movant cannot show a genuine dispute of material fact.

If the nonmovant bears the burden of proof of an issue, the movant must show the absence of sufficient evidence to support an essential element of the non-movant's claim. *Norwegian Bulk Transp. A/S*, 520 F.3d at 412. Upon an adequate showing of insufficient evidence, the non-movant must respond with sufficient evidence to support the challenged element of its case. *Celotex*, 477 U.S. at 324. The motion should be granted only if the nonmovant cannot produce evidence to support an essential element of its claim. *Condrey v. Suntrust Bank of Ga.*, 431 F.3d 191, 197 (5th Cir.2005).

Issue Presented

***4** For the purposes of his Motion for Summary Judgment, the Liquidating Trustee stipulates that all facts alleged by the Delaware Plaintiffs in the Delaware Actions are true. Accordingly, the Court's task is only to determine whether the claims asserted in the Delaware Actions are direct or derivative claims.

Facts

The Court summarizes the factual allegations of the Delaware Actions. The allegations are assumed true for the purposes of this Memorandum Opinion.

The Delaware Plaintiffs were early investors in DMT, originally purchasing shares in the company in 2002. By 2006, the Delaware Plaintiffs' shares of DMT common stock represented more than 8.5% of the company's overall outstanding common stock. The Delaware Plaintiffs have collectively invested over $1.73 million in DMT.

This is a case primarily about the Controlling Shareholders' alleged usurpation of power over, mismanagement and looting of the Debtors, and the failure of the Debtors' officers and directors to prevent the Controlling Shareholders from doing so. The Controlling Shareholders include: (i) Nasser Kazeminy; (ii) DCC Ventures, LLC, a company allegedly owned or controlled by Kazeminy; (iii) NJK Holdings Corporation, a company allegedly owned or controlled by Kazeminy; (iv) Otto Candies, Jr. and (v) Otto Candies, III; (vi) Otto Candies, LLC, a company allegedly owned or controlled by Candies, Jr. and Candies, III (collectively "Candies"); and (vii) the Triomphe Investors, LLC, a company allegedly owned or controlled by Kazeminy's son, Nader Kazeminy. For the sake of simplicity, any reference to "Kazeminy and Candies" in this Memorandum Opinion should be considered as synonymous with "Controlling Shareholders."

Kazeminy (and companies he owned or controlled) became the majority shareholder of the Debtors. Candies subsequently gained a significant portion of ownership in the Debtors. Kazeminy and Candies collectively became owners of 90% of the Debtors' outstanding common stock. Kazeminy and Candies then allegedly used their control over the Debtors and their officers and directors to benefit themselves at the Debtors' and their shareholders expense.

1. Transactions Between Otto Candies, LLC and DMT—as Alleged in Delaware Complaint

DMT regularly did business with Otto Candies, LLC which supplied vessels for DMT's subsea projects. Due to Candies' relationship with Kazeminy and the officers and directors of DMT, the business transactions between Otto Candies, LLC and DMT were often not at arms-length and resulted in DMT incurring substantial losses.

For instance, during 2006, 2007, and 2008, Otto Candies, LLC repeatedly misrepresented the state of its vessels and then charged DMT hundreds of thousands of dollars to lease and charter vessels that were broken, poorly built, or not able to meet U.S. Coast Guard regulations. This forced DMT to pay substantial sums to repair the defective vessels that Otto Candies, LLC had off-loaded onto it. It also resulted in the loss of valuable contracts with DMT's customers and, consequently, the loss of millions of dollars in revenue.

***5** Otto Candies, LLC also sold vessels to the Debtors at inflated prices. In May 2007, Candies and Kazeminy caused DMT to pay $6 million above the contracted price to purchase a vessel, later named the Emerald, simply because Candies demanded such amount at the closing of the sale transaction. In October 2007, DMT purchased the vessels the Agnes and the Sapphire. The consideration for the purchase was $35 million in DMT stock, although the two vessels were worth no more than $28 million. This resulted in an overpayment to Candies of at least $7 million.

As in the Agnes and Sapphire transaction, DMT at times paid Candies in convertible debt, instead of cash, for services and vessels. When Candies converted the DMT debt into DMT common equity, Candies received more DMT shares than it would have received had DMT not overpaid for the assets and services. This diluted Delaware Plaintiffs' shares and enabled Candies to join Kazeminy as Controlling Shareholders of the Debtors.

2. Improper Payments Made by DMT—as Alleged in Delaware Complaint

Kazeminy's influence over DMT is evidenced by the improper payments that were made at his direction. First, at Kazeminy's direction, DMT sent three payments of $25,000.00 each to a former United States Senator from Minnesota, Norm Coleman, through an insurance company that employed Senator Coleman's wife. Kazeminy's relative, Behnaz Ghaufouri, received a $6,000.00 transfer from DMT. These payments were made despite the fact that neither Coleman nor Ghafouri performed any services for DMT.

3. The Short–Form Merger—as Alleged in Delaware Complaint

On October 10, 2008, after learning of, among other things, Candies' self-dealing and the payments to Senator Coleman, the Delaware Plaintiffs sent a shareholder demand letter to the DMT board of directors. The Delaware Plaintiffs demanded an investigation into the alleged wrongful conduct. DMT responded by establishing a special committee to investigate the allegations raised in the demand letter. According to the Delaware Plaintiffs, this special committee was not independent and failed to conduct a proper investigation. On June 30, 2009, the special committee released a press statement declaring that it found no wrongdoing over the course of its investigation.

The day after the press statement's release, as part of a scheme to deprive the Delaware Plaintiffs of their standing to bring derivative claims, Kazeminy and Candies commenced and concluded a Delaware Section 253 short-form merger. The short-form merger was entered into between the Debtors and NKOC, Inc. [FN8] The Delaware Plaintiffs were not notified and did not consent to the merger.

FN8. NKOC is named after the initials of Nasser Kazeminy and Otto Candies. NCOK was merged into DMH and

NCOK's separate corporate existence ceased as of the date of the merger.

On July 11, 2009, ten days after the merger, the Delaware Plaintiffs were notified of the merger and offered one cent per share for their DMT shares. Although the company was purportedly valued as worth over $100 million in the 18 months preceding the merger, the notice of merger stated that the company had become so bereft of assets and laden with debt as to be worth nothing at all. The merger compensation totaled $22,000.00 for all minority shares of DMT.

***6** The short-form merger effectively terminated the Delaware Plaintiffs' ownership in the Debtors and rendered the Controlling Shareholders 100% owners of the Debtors.

Analysis[FN9]

FN9. The parties agree that Delaware law governs this dispute. *See also* In re Dexterity Surgical, Inc., 365 B.R. 690, 695 (Bankr.S.D.Tex.2007) "Under Texas law, actions involving the internal affairs of a foreign corporation are governed by the law of the state of incorporation.") (citations omitted).

A derivative lawsuit is an action that is commenced by a corporation's shareholder on behalf of the corporation for harm allegedly done to the corporation. *Tooley v. Donaldson, Lufkin & Jenrette, Inc.* 845 A.2d 1031, 1036 (Del.2004). "Because a derivative suit is being brought on behalf of the corporation, the recovery, if any, must go to the corporation." *Id.* A shareholder may also bring a direct action for direct injuries to the shareholder's legal rights as a shareholder. *Id.* In such direct lawsuits, "the recovery or other relief flows directly to the stockholders, not to the corporation." *Id.*

In order to determine whether a claim is direct or derivative, the "analysis must be based solely on the following questions: Who suffered the alleged harm—the corporation or the suing stockholder individually—and who would receive the benefit of the recovery or other remedy"? *Id.* at 1035. Courts must "look to the nature of the wrong and to whom the relief should go." *Id.* at 1039. In order to have a direct claim, a "stockholder's claimed direct injury must be independent of any alleged injury to the corporation." *Id.* "The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation." *Id.*

Furthermore, under *Tooley,* "the duty of the court is to look at the nature of the wrong alleged, not merely at the form of words used in the complaint." *In re J.P. Morgan Chase & Co.'s S'Holders Litig.*, 906 A.2d 808, 817 (Del.2005) (internal citation omitted). "Instead the court must look to all the facts of the complaint and determine for itself whether a direct claim exists." *Id.* (internal citation omitted).

The possible derivative and direct causes of action fall into three categories. First are the claims that are clearly derivative, where the shareholder's injury flows directly from harm to the corporation. As an example, a derivative claim would exist if a corporate executive breaches a fiduciary duty and approves improper financial transactions, resulting in harm to the corporation and a consequent reduction in the value of stock held by shareholders. The second category is that of clearly direct claims, where the stockholder proves an individualized injury but where the corporation is unharmed as a result. The third category is where certain shareholders suffer an individualized injury in addition to an injury to the corporation as a whole, which may result in both direct and derivative claims. The Court in *Tooley* stated that "the stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without

showing an injury to the corporation." 845 A.2d at 1039. This does not mean, however, that all shareholder claims are derivative if they result from a transaction injuring both the corporation and shareholders. *See* Gentile v. Rossette, 906 A.2d 91 (Del.2006) (holding that, under *Tooley,* independent harms to a corporation and to certain shareholders may derive from the same transaction, resulting in direct and derivative claims for the shareholders).

*7 The Court must now analyze each of the Delaware Plaintiffs' claims for the purpose of determining whether they constitute direct or derivative claims. As set forth below, all of the claims except those relating to the allegation of an independent injury (here, equity dilution and expropriation of economic value) are derivative claims.

1. Breach of Fiduciary Duty Against Debtors' Officers and Directors

The Delaware Plaintiffs' first claim at issue is for breach of fiduciary duty against DMT's officers and directors. The Delaware Plaintiffs allege that the actions of DMT's officers and directors, in aiding and approving DMT actions for the private purposes of the Controlling Shareholders, were without merit, served no legitimate business purpose, and were not in the best interests of DMT and/or its shareholders. These actions include gross misuse of corporate funds, self-dealing, equity dilution, failure to follow corporate formalities, and gross mismanagement.

The Liquidating Trustee argues that the Delaware Plaintiffs' breach of fiduciary duty claim against the officers and directors arises out of harm inflicted upon the Debtors, not the minority shareholders. According to the Liquidating Trustee, it was the Debtors' funds that were allegedly misused, the Debtors' opportunities that have been lost because of alleged self-dealing, the Debtors' operations hurt by the alleged failure to follow corporate formalities, and the Debtors' business damaged by the alleged mismanagement.

FLI's Response to the Liquidating Trustee's Motion for Summary Judgment does not contest the Liquidating Trustee's argument on this point. FLI essentially concedes that the breach of fiduciary duty claim against DMT's officers and directors is a derivative claim.

The Court largely agrees with the Liquidating Trustee that the breach of fiduciary duty claim asserted by the Delaware Plaintiffs against the Debtors' officers and directors is derivative. For example, the harm caused by the officers and directors concerning Candies' allegedly inflated sale prices for Candies' vessels was borne by the Debtors. The same can be said for the payments allegedly made to Senator Coleman. Likewise, it is the Debtors who would reap any recovery against Candies for overcharges or Senator Coleman for the $75,000.00 in alleged improper transfers.

The missing link in most of the Delaware Plaintiffs' allegations against the Debtors' officers and directors is an independent injury suffered by the Delaware Plaintiffs. For instance, there is no doubt that the substantial overpayments allegedly collected by Candies damaged shareholder value by decreasing the Debtors' equity. But that harm corresponded to the primary injury, the overpayments themselves, which depleted the Debtors' resources. The decline in shareholder value from overpayments to Candies is not an injury that is independent of any injury to the Debtors.

On the other hand, the Court finds that certain allegations involving equity dilution and expropriation of value must survive the Liquidating Trustee's Motion for Summary Judgment because they contain an independent injury. A claim of breach of fiduciary duty by corporate officers or directors related to this independent injury is direct. This relates to the allegation that Candies was, at times, overpaid through the Debtors' issuance of convertible notes in Candies' favor. Candies later converted these notes into DMT equity, thereby diluting the Delaware Plaintiffs' ownership stake in the Debtors and

expropriating some of its value.

***8** Generally speaking, "claims of overpayment are treated as causing harm solely to the corporation and, thus, are regarded as derivative." Rossette, 906 A.2d at 99. However, Delaware law recognizes that one variation of corporate overpayment results in both direct and derivative claims. This is where "(1) a stockholder having majority or effective control causes the corporation to issue 'excessive' shares of its stock in exchange for assets of the controlling stockholder that have a lesser value; and (2) the exchange causes an increase in the percentage of the outstanding shares owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public (minority) shareholders." Id. at 100. In a normal overpayment situation, "dilution in value of the corporation's stock is merely the unavoidable result ... of the reduction in the value of the entire corporate entity, of which each share of equity represents an equal fraction." Id. at 99. Therefore in the normal overpayment situation, the stockholders have only a derivative claim. *Id.* In the above atypical situation where shares are issued to a controlling shareholder for the purposes of diluting the holdings of minority shareholders, "[a] separate harm also results: an extraction from the [minority] shareholders, and a redistribution to the controlling shareholder, of a portion of the economic value and voting power embodied in the minority interest. As a consequence the [minority] shareholders are harmed, uniquely and individually, to the same extent that the controlling shareholder is (correspondingly) benefitted." *Id.* at 100. The claim for recovery of the overpayment by the corporation is still, of course, derivative. *Id.* However, the minority shareholders also have a direct claim for the expropriation of value from their equity interests that benefitted the majority shareholders. *Id.* This type of situation, in which harm befalls both the corporation and the minority shareholders, falls into the third category listed above. It passes the *Tooley* test, because although separate harms to the corporation and the shareholder result from the same transaction, they are independent of one another. Id. at 99.

An important aspect of the situation described in *Rossette* is that the form of overpayment must be stock in order for the dual harms to result. *Id.* at 100. However, the issuance of sham convertible notes might inflict similar injury. If the issuance of convertible notes were a sham, intended at the outset to be converted into equity, the Debtors' balance sheet would reflect only a sham liability for the convertible notes. It would be a temporary, fictitious liability that would evaporate once the conversion was executed. Just like an issuance of additional shares for no consideration, this would create unique harm to the minority shareholders. The substance of the Debtors' assets and liabilities would be unaffected from beginning to end, and therefore neither transaction would result in injury to the Debtor. All of the injury would flow to the allegedly-diluted minority shareholders.

***9** When a worthless (or hyper-valued) asset is obtained for stock (or, for that matter, for sham convertible notes that are the equivalent of stock) issued to majority shareholders, only the minority shareholders would suffer true injury. Although the corporation might temporarily record the inflated value on its books, marketplace realities would eventually control valuation. When the asset was then reduced to true market value, the only lasting effect would be on the now-diluted minority shareholders. Their ownership percentage in the Debtor would decrease due to the issuance of stock (or the sham conversion). The Debtor's total equity remains unchanged since nothing was paid for the stock, while the minority shareholders' percentage of the Debtor's total equity decreases. This represents a unique and independent injury suffered by the Delaware Plaintiffs. *See* In re J.P. Morgan Chase & Co., 906 A.2d 808, 818 (Del. Ch.2005) (a direct claim exists "where a significant stockholder's interest is increased at the sole expense of the minority") (internal citation omitted).

Accordingly, to the extent that the Delaware Plaintiffs allege an independent injury concerning equity dilution and expropriation of value from their holdings, falling into either the second or third category above, the Liquidating Trustee's Motion for Summary Judgment is denied. With regard to all remaining allegations, the Court holds that the Delaware Plaintiffs' claim for breach of fiduciary duty against the Debtors' officers and directors is a derivative claim and, therefore,

property of the Liquidating Trust.

The Court recognizes that this ruling creates a unique fact issue that must be resolved in ensuing litigation—was the issuance of the convertible debt a sham? If the convertible debt was legitimately issued, the harm from the issuance of the debt was suffered by the corporation and the minority shareholder's loss would be derivative. If the issuance of the convertible debt was a sham intended to expropriate value from and dilute the minority shareholders' holdings, then they have suffered a direct injury. The burden of proof must rest on the minority shareholders to demonstrate any such sham.

2. Breach of Fiduciary Duty by the Debtors' Controlling Shareholders

The Delaware Plaintiffs' second claim at issue in the Motion for Summary Judgment is a claim against the Controlling Shareholder Defendants for Breach of Fiduciary Duty. As with the claim against the Corporate Director's and Officers, the Delaware Plaintiffs allege many illegitimate acts by the Controlling Shareholders, including looting, self-dealing, and unfair dilution of the minority shareholder's interest. (ECF No. 1, p. 46).

The Liquidating Trustee argues that this "Delaware Cause of Action is clearly focused on harm to the Debtors, and ... is a derivative claim that belongs to the Trustee." [MSJ, p. 11] The Court agrees with the Liquidating Trustee regarding most but not all of the allegations.

*10 Except as set forth in the next sentence, the breach of fiduciary duty claims against Debtors' Controlling Shareholders are derivative claims. The breach of fiduciary duty claims against Debtors' Controlling Shareholders are direct claims only to the extent that the alleged breach is (i) the improper issuance of dilutive shares, (ii) the issuance of sham convertible notes for the purpose of dilution, or (iii) an improper use of the Delaware short-form merger that resulted in injury to the Delaware Plaintiffs.

3. Unjust Enrichment Against Debtors' Controlling Shareholders

The Delaware Plaintiffs next claim at issue is for Unjust Enrichment Against Debtors' Controlling Shareholders. They allege that the Controlling Shareholders unjustly enriched themselves with DMT's corporate assets, to the detriment of the Plaintiffs. (ECF No. 1, p. 47).

The Liquidating Trustee again alleges that any claims of unjust enrichment are derivative, and therefore property of the Liquidating Trust. The Court agrees with the Liquidating Trustee insofar as the claims relate to corporate looting and generic self-dealing, with the defendants unjustly enriching themselves with DMT's corporate assets. However, a claim of unjust enrichment via expropriation of value from the minority shareholders' DMT holdings, as opposed to unjust enrichment via theft of corporate assets, is direct. The unjust enrichment claims are derivative except as set forth in the next sentence. The unjust enrichment claims are direct claims only to the extent of injuries from (i) the improper issuance of dilutive shares, (ii) the issuance of sham convertible notes for the purpose of dilution, or (iii) an improper use of the Delaware short-form merger that resulted in injury to the Delaware Plaintiffs.

4. Aiding and Abetting a Breach of Fiduciary Duty Against Debtors' Controlling Shareholders

The aiding and abetting claims are derivative claims to the extent that the actions that were aided or abetted resulted in derivative injuries as set forth in this opinion. To the extent that the actions that were aided and abetted resulted in direct injury, as set forth in this opinion, the aiding and abetting allegations are direct.

5. Aiding and Abetting a Breach of Fiduciary Duty Against Debtors' Officers and Directors

The aiding and abetting claims are derivative claims to the extent that the actions that were aided or abetted resulted in derivative injuries as set forth in this opinion. To the extent that the actions that were aided and abetted resulted in direct injury, as set forth in this opinion, the aiding and abetting allegations are direct.

6. Fraud Through Active Concealment Against All Defendants

The allegations in the Delaware Complaint with respect to this claim relate to efforts by Defendants to shield relevant information about DMT, not to the independent injury allegedly suffered by the Delaware Plaintiffs. This claim is derivative.

7. Fraud Through Silence in the Face of a Duty to Disclose Against All Defendants

***11** As with the claim of Fraud through Active Concealment, the allegations contained in the Complaint do not relate to the independent injury allegedly suffered by the Delaware Plaintiffs. This claim is derivative.

8. Wrongful Equity Dilution Against Debtors' Controlling Shareholders

This issue is fully addressed in the breach of fiduciary duty cause of action against the Debtors' Officers and Shareholders. The Court incorporates the reasoning set forth in that section.

9. Shareholder Oppression

This issue is fully addressed in the breach of fiduciary duty cause of action against the Debtors' Officers and Shareholders. The Court incorporates the reasoning set forth in that section.

Conclusion

For the above stated reasons, the Liquidating Trustee's Motion for Summary Judgment is granted in part and denied in part.

The Court believes that the reasoning in this Memorandum Opinion fully resolves all matters in dispute between the parties. Within 14 days, the parties must either (i) set forth any remaining disputes; or (ii) file a proposed final judgment consistent with this opinion.

Bkrtcy.S.D.Tex.,2011.
In re Deep Marine Holdings, Inc.
Slip Copy, 2011 WL 2420274 (Bkrtcy.S.D.Tex.)

END OF DOCUMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
DEEP MARINE HOLDINGS, INC., *et al.*,	§	
Debtors,	§	
	§	
DEEP MARINE HOLDINGS, INC., *et al.*,	§	
Plaintiffs,	§	
v.	§	CIVIL ACTION NO. 11-2926
	§	
FLI DEEP MARINE LLC, *et al.*,	§	
Defendants.	§	

ORDER

A Bankruptcy Court may not issue a final order or judgment in matters that are within the exclusive authority of Article III courts. *Stern v. Marshall*, 131 S.Ct. 2594, 2620 (2011). In *Stern*, the bankruptcy estate asserted a state-law counterclaim to a creditor's proof of claim. The Supreme Court held that a bankruptcy court did not have the constitutional authority to enter final judgment over a counterclaim that would not necessarily be resolved by the resolution of the proof of claim. *Id.* at 2611.

The debtor's fraud claim does not fall within the Court's constitutional authority because it is not integrally related to the claims adjudication process in Judge Marvin Isgur's bankruptcy case, nor does the claim arise out of the bankruptcy itself.

The Court has reviewed the Memorandum and Recommendation (Instrument No. 1) signed by Bankruptcy Judge on August 4, 2011, regarding **Instrument 133**. The Court has reviewed the Memorandum and Recommendation and made a de novo review of the Bankruptcy Judge's recommended dispositions, and after consideration of the applicable

law, is of the opinion that said Memorandum and Recommendation should be adopted by this Court. It is therefore

ORDERED, ADJUDGED and DECREED that United States Bankruptcy Judge's Memorandum and Recommendation is hereby adopted by this Court and the Liquidating Trustee's Motion for Summary Judgment is **GRANTED in part** and **DENIED in part** as noted therein.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 4th day of October, 2011, at Houston, Texas.

VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DEEP MARINE HOLDINGS, INC., and DEEP MARINE TECHNOLOGY INCORPORATED	§	
Plaintiffs,	§	
v.	§	CIVIL ACTION NO. 11-2926
FLI DEEP MARINE LLC, BRESSNER PARTNERS LTD., LOGAN LANBERG HARLEY LANBERG, and DEEPWORK, INC.,	§	
Defendants.	§	

FINAL JUDGMENT

On October 14, 2011, the Court issued an Order, (Instrument No. 4), adopting the Bankruptcy Court's Report and Recommendation and its Memorandum Opinion. (Instrument No. 1). For the reasons set forth in the Bankruptcy Court's Memorandum Opinion it is hereby **FOUND, ORDERED, and ADJUDGED** that:

The following causes of action are derivative claims and property of the Deep Marine Liquidating Trust, such that the Defendants are barred from asserting such claims by the Confirmation Order and Bankruptcy Code:

1. The cause of action for breach of fiduciary duty against the officers and directors and certain shareholders of Deep Marine Technology Inc. and Deep Marine Holdings Incorporated (together, "DMT").
2. The cause of action asserted by the Defendants in the Delaware Actions against certain shareholders of DMT for unjust enrichment.
3. The cause of action asserted by the Defendants in the Delaware Actions against certain shareholders of DMT for aiding and abetting a breach of fiduciary duty.

4. The cause of action asserted by the Defendants in the Delaware Actions against officers and directors of DMT for aiding and abetting a breach of fiduciary duty.
5. The cause of action asserted by the Defendants in the Delaware Actions against certain shareholders of DMT for wrongful equity dilution.
6. Any cause of action for shareholder oppression asserted or to be asserted by the Defendants against certain shareholders of DMT.
7. The cause of action asserted by the Defendants in the Delaware Actions against all defendants in the Delaware Actions for fraud through active concealment.
8. The cause of action asserted by the Defendants in the Delaware Actions against all defendants in the Delaware Actions for fraud through silence in the face of a duty to disclose.

EXCEPT THAT, to the extent that any cause of action described above in numbers one through six is based on (a) the improper issuance of dilutive shares, (b) the issuance of sham convertible notes for the purpose of dilution, or (c) an improper use of the Delaware short-form merger that resulted in injury to the Defendants, such causes of action are not derivative and therefore the Defendants are not enjoined from pursuing these direct claims in any court of competent jurisdiction.

All derivative causes of action described herein are property of the Deep Marine Liquidating Trust and the Defendants are permanently enjoined from pursuing any legal action or exercising any control over such causes of action.

THIS IS A FINAL JUDGMENT.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 11th day of January, 2012, at Houston, Texas.

VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE